87-392

SUPREME COURT, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN T. CORRIGAN,
Guardian of Daughter,
Maura L. Corrigan,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE U.S. COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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September 3, 1987

QUESTION PRESENTED

Whether the Supremacy Clause of Article VI, Clause 2 of the United States Constitution dictates that federal, rather than state, law defines the duty of care of military personnel toward civilians when the military has gratuitously undertaken to perform a service, in actions brought under the Federal Tort Claims Act.

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STATEMENT OF GROUNDS FOR JURISDICTION

On June 10, 1987, the United States Court of Appeals for the Fourth Circuit filed an Order that the Petition For Rehearing and Suggestion For Rehearing *en banc* was denied. The instant petition for *certiorari* is filed within ninety (90) days of that date. Therefore, this Court's jurisdiction is invoked under 28 *U.S.C.A.* §1254(1).

STATEMENT OF THE CASE

This action was brought by plaintiff-petitioner John T. Corrigan, guardian (hereinafter "petitioner"), on behalf of his daughter, Maura L. Corrigan, against defendant-respondent United States of America (hereinafter "respondent"), pursuant to the Federal Tort Claims Act (hereinafter "FTCA"), to recover damages for devastating personal injuries suffered by Maura Corrigan. Ms. Corrigan was injured when the automobile in which she was a passenger was struck by another automobile, driven by Patrick M. Patterson, an off-duty private of the U.S. Army, stationed at Fort Myer, Virginia.

The facts as found by the District Court are not in dispute. On the afternoon of the accident, December 19, 1981, Patterson went to the Fort Myer Snack Bar, where he drank several beers.

At around 8:00 p.m. that evening, Patterson returned to the Fort Myer Snack Bar, where he consumed roughly three more beers. Shortly after 10:00 p.m., Patterson and another serviceman drove in Patterson's car to the Arlington Hall NCO Club. Arriving at about 10:15 p.m., Patterson, who was underage, was nevertheless admitted to the NCO Club. It was the clear policy of the Club to admit any person with military identification who was 18 years or older. Patterson spent the next two hours drinking Peppermint Schnapps with Coke and Jack Daniels Bourbon with Coke continuously until about midnight. A bartender on duty that evening recalled seeing Patterson at the Club and serving him mixed drinks. The bartender testified that Patterson was drinking heavily, and that he became increasingly loud and boisterous. By the time Patterson left, he was extremely

intoxicated. Even though the bartender was aware of Patterson's obvious intoxication, she never refused to serve Patterson any drinks, nor did she, or any other Club employee, take steps to see that Patterson was "cut off." No Club employee made any effort to see that Patterson did not drive an automobile home.

Just after midnight, Patterson left the Club alone, entered his car, and began to drive recklessly. Shortly thereafter, Patterson ran a stop sign and struck an automobile driven by Michael McDonald, in which Maura Corrigan was a passenger. Mr. McDonald was killed and Maura Corrigan remains in a persistently vegetative state and is comatose.

No intoxicants were found in Patterson's car. The District Court found that Patterson did all his drinking that evening at either the Fort Myer

Snack Bar or the Arlington Hall NCO Club.

The District Court found in petitioner's favor on May 20, 1985, and rendered a verdict in the amount of $969,496.79. The Court's ruling was based on its finding that the NCO Club, having knowingly served liquor to an intoxicated and underaged soldier, had breached a duty it owed to the community to "stop pouring alcohol down the throat of a patron who, because of alcohol, has lost control over his judgment, his reflexes, and his sense of responsibility to others." The Court held that, based on these facts, the highest court of Virginia would likely recognize "dram shop" liability. Although the issue of assumed duty by the Army was raised and litigated by petitioner, the District Court failed either to address or take into account applicable Virginia and Fourth Circuit law regarding this

issue. In so doing, it failed to consider the Army's adoption of regulations concerning the dispensing of alcoholic beverages to minors and already intoxicated individuals. Moreover, the District Court completely overlooked the factual distinctions between Army regulations concerning the dispensing of alcoholic beverages, which were unquestionably violated, and similar Virginia criminal statutes.

On August 19, 1985, respondent filed a Notice of Appeal and Reconsideration of Final Judgment. On August 23, 1985, petitioner filed a Notice of Cross-Appeal on the Issue of Assumed Duty. The resulting Cross-Appeals were stayed pending the decision of the Virginia Supreme Court in Hutson v. Marshall Enterprises, Inc., No. 850858 Slip op. (petition filed October 29, 1985). In the interim, the Virginia

Supreme Court held that Virginia does not recognize dram shop liability. Williamson v. Old Brogue, Inc., 232 Va. 350, 350 S.E.2d 621 (1986). On the basis of the decision in Williamson, the Court of Appeals for the Fourth Circuit held on April 2, 1987, that, because Virginia does not recognize dram shop liability, respondent was not liable for the injuries to Maura Corrigan, despite the numerous violations of Army regulations regarding the sale of intoxicants to underage and inebriated servicemen. Moreover, the Court held that the special relationship between the armed forces and its members did not give rise to an exception to dram shop non-liability in Virginia. In so holding, the Court of Appeals again ignored petitioner's argument that Virginia recognizes the concept of assumed duty. More importantly, the Court ignored

petitioner's argument that the concept of assumed duty applies under the FTCA, regardless of whether the Government would be liable to the same extent as a private person under the law of the place where the cause of action arose.

On April 15, 1987, petitioner asked for rehearing, and, in the alternative, suggested a rehearing en banc. Petitioner's brief emphasized an argument made from the inception of this action: that the Army had assumed a duty not to behave negligently in regard to its alcohol-use regulations for servicemen, that the general public was the beneficiary of that duty, and that the duty was to be interpreted according to federal, not state, law. On June 10, 1987, the petition for rehearing was denied, in effect allowing the opinion of the three-judge panel to stand, and

acquiescing in the entry of final judgment in favor of respondent.

REASON FOR GRANTING THE WRIT

The Supremacy Clause of Article VI, Clause 2 of the United States Constitution requires that Army Regulations adopted under the authority of Congress take precedence over applicable state law.

A writ of certiorari may be granted "[w]hen a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter . . . ." Supreme Court Rule 17(a). In addition, certiorari may be granted when a "Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by the Court, or has decided a federal question in a way in conflict with the applicable decisions of this Court." Supreme Court Rule 17.1(a). In reversing the decision of the District Court, the United States Court of Appeals

for the Fourth Circuit denied liability solely because the Commonwealth of Virginia does not recognize dram shop liability. In so doing, the Court not only failed to address applicable Virginia and Fourth Circuit law on the subject, but rendered a decision in conflict with the decisions of other Courts of Appeals and with applicable decisions of this Court.

Essentially, this is a case of an Army enlisted man being served alcohol on an Army base by Army employers in contravention of Army regulations, promolgated under Congressional statute. Put differently, suit was brought because a federally created duty was breached by federal employees on a federal installation. Under these conditions, both lower courts, somewhat remarkably, applied Virginia local law. These same lower courts then allowed the

interpretation of the applicable duty of military personnel toward civilians to be defined, not by the applicable federal law and regulations, but by local law. Thus, despite the fact that the Federal Government has spoken, the courts below looked solely to state law for guidance, in contravention of the Supremacy Clause of the Constitution.

Basically, petitioner's argument throughout this case, beginning with his request for production of applicable army regulations at the very onset of discovery, is that the Army failed to abide by its very own regulations. These duties, voluntarily assumed and undertaken, were prescribed by Congress. 50 U.S.C.A. Appx. §473 (West Supp. 1987). Thus, Congress carved out its authority in this area, and Congressional intent and the consequent Army regulations can be the only source of authority here.

The repeated resort, by both the trial and appellate courts, to Virginia law was not only ill-advised, it contravened the Supremacy Clause of the Constitution.

In Indian Towing Co. v. United States, this Court held "[It] is horn-book tort law that one who undertakes to warn the public of danger and thereby induces tort law that one who undertakes to warn the public of danger and thereby induces reliance, must perform his 'good samaritan' task in a careful manner." 350 U.S. 61, 64-65 (1955). In making this oft-quoted statement, Justice Frankfurter did much to eliminate the debate over the governmental-proprietary distinction rejected under the FTCA. At the same time, confusion was created as to whether 28 U.S.C.A. §2674 and 28 U.S.C.A. §1346(b) always require that the law of the state where the act or omission occurred be

controlling, particularly in those cases where the Federal Government undertakes to perform a service and does so negligently. The dissent was quick to point out that, under existing Louisiana law, the United States would not have been liable for the negligent maintenance of its lighthouses. Id. at 75-76. Moreover, nowhere in the opinion was it mentioned where, under Louisiana law, the "Good Samaritan" Doctrine was recognized. Although the Court later characterized its holding in Indian Towing as being based on the law of the state, Raynoier, Inc. v. United States, 352 U.S. 315, 319 (1957), that decision did little to clarify the situation. As a result, courts in different jurisdictions have taken different approaches in defining the duty of care, and ultimately the scope of liability, under the FTCA. On at least one occasion, this Court has

held squarely that where Congress has spoken, federal, not state, law defines the duty of care under the FTCA. U.S. v. Muniz, 374 U.S. 150, 164-65 (1963). Among the circuits, there is a staggering array of contradictory decisions, none of which define a clear standard for determining the Government's duty in a given case.

Two well-known decisions hold that, where the United States undertakes to perform services not required in the absence of specific legislation, it will be liable if those services are negligently performed, notwithstanding the FTCA. Ingham v. Eastern Airlines, Inc., 373 F.2d 227 (2nd Cir. 1967); Kipf v. United States, 501 F. Supp. 110 (D. Mont. 1980). Other courts have taken the position that breaches of federal statutory duties do not give rise to a claim for relief absent a corresponding

duty imposed by applicable state law. See e.g., Baker v. F&F Investment Co., 489 F.2d 829, 835 (7th Cir. 1973); Devlin Lumber & Supply Corp. v. United States, 488 F.2d 88, 89 (4th Cir. 1973); First State Bank of Hudson County v. United States, 599 F.2d 558 (3rd Cir. 1979), cert. den'd, 444 U.S. 1013 (1980). Still other courts have held that federal statutes or regulations are relevant in assessing a breach of duty for purposes of the FTCA if, under state law, violation of the statute or regulation would be considered negligence per se. Schindler v. United States, 661 F.2d 552, 560-61 (6th Cir. 1981); Griffin v. United States, 500 F.2d 1059 (3rd Cir. 1974). Finally, other courts have applied the "Good Samaritan" Doctrine only after an express finding that the doctrine is recognized under state law. Ramer v. United States, 455 F. Supp. 165 (W.D. Ky. 1978);

Blessing v. United States, 447 F. Supp. 1160 (E.D. Pa. 1978).

While it is clear enough from the statutory language, particularly that of 28 U.S.C.A. §1346(b), that the "law of the place" is to be applied under the FTCA, it is also clear that the "law of the place" is not the same as or coextensive with the law of the state, notwithstanding the broad language of cases like Raynoier.

Basically, while the FTCA in general looks to the law of the state to understand the scope of the duty, this can not be the case where Congress has elected to preempt the area. Here, quite clearly, the law of the place is federal law. That is, in determining the nature of the duty, Congress has spoken. Thus, for purposes of judging the behavior of the United States in serving alcohol to an inebriated minor, the law of the

place, the only law a court can apply legally under the FTCA and the U.S. Constitution, is Congress' law.

One need only look to a series of recent decisions applying the "Good Samaritan" Doctrine to realize that, while appearing to defer to state law, many courts simply apply the doctrine when, in fact, there is virtually no state authority for its application. See e.g., Moody v. United States, 774 F.2d 150, 155 (6th Cir. 1985), cert. den'd., 107 S.Ct. 65 (1986) ("[w]hile no Tennessee court has expressly adopted the "Good Samaritan" doctrine . . . the doctrine's essential principle is reflected in Tennessee tort law . . . ."; Jeffries v. United States, 477 F.2d 52, 55 (9th Cir. 1973) (stating that "the Good Samaritan Doctrine . . . is recognized under the applicable law of Montana . . ." where, in fact, the

Montana Supreme Court had refused to apply the doctrine in State, ex rel. Eacker v. Dist. Ct. of 11th Dist., 154 Mont. 36, 459 P.2d 686 (1969); United States v. DeVane, 306 F.2d 182 (5th Cir. 1962); U.S. v. Gavagan, 280 F.2d 319 (5th Cir. 1960), cert. den'd., 364 U.S. 933 (1961).

On at least one occasion, this Court has recognized that a federal court of appeals had applied the Good Samaritan Doctrine absent any state precedent, yet refused to address the issue. In Block v. Neal, 460 U.S. 297 (1983), this Court granted certiorari to reconcile a lower appellate decision with its prior holdings under the FTCA. In addressing the Court of Appeals' holding that a claim for relief for negligent inspection arose under the Good Samaritan Doctrine, it was noted:

> The Court of Appeals found that respondent stated a

> claim against the United States under the common-law Good Samaritan Doctrine which is described in Section 323 of the Restatement (Second) of Torts (1965). However, the court did not expressly find that Tennessee law recognizes this doctrine, see 28 U.S.C.A. Section 1346(b), and would apply it to a private person responsible for similar negligence . . . .

Id. at 293 n. 3 (citations omitted).

In fact, Tennessee has never recognized the Good Samaritan Doctrine, let alone the version set forth in the Restatement (Second) of Torts §323. If, as Section 1346(b), the jurisdictional provision of the FTCA, states, a claim for relief must arise "in accordance with the law of the place," then this Court would have been compelled to dismiss the petitioner's case in Block, for "even if not raised by the parties, [the Supreme Court] cannot ignore the absence of federal jurisdiction . . . ." Lake

Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979). By failing to dismiss the action, this Court gave its tacit approval to the proposition that the Good Samaritan Doctrine, at least in cases where federal statutes or regulations define a duty which would not exist in their absence, may be applied absent any state authority for its application.

Perhaps, as is suggested in Indian Towing, courts have made little effort to find state law authority before applying the Good Samaritan Doctrine because the doctrine is implicit in the general common law of torts. See Mallen v. United States, 506 F. Supp. 728, 735 (N.D. Ga. 1979) (couching Good Samaritan Doctrine in general tort elements of duty, breach, causation and damages). The better view, however, which is explicit in Muniz, is that, where

Congress, either by statute or through regulations promulgated under Congressional authority, authorizes the Government to provide services otherwise not required of it, such services must be performed with due care, even in the absence of a duty under state law.

This conclusion is well supported by decisions construing other federal statutory schemes where Congress has deferred some part of its legislative jurisdiction to the states. In U.S. v. Sharpnack, 355 U.S. 286 (1958), for example, this Court held that 18 U.S.C.A. §13, commonly known as the Assimilative Crimes Act, is constitutional insofar as it makes applicable to a federal enclave the criminal law of the state where the enclave is situated. Id. at 291-92. This Court stated, however, that

> [r]ather than being a delegation by Congress of its legislative authority

> to the States, [the Act] is a deliberate continuing adoption by Congress for federal enclaves of such unpreempted offenses and punishments as shall have been already put in effect by the respective States . . . . Congress retains power to exclude a particular state law from the assimilative effect of the Act . . . .

Id. at 294.

The developing case law surrounding the Assimilative Crimes Act shows that state law will not be assimilated when inconsistent with federal law or policies expressed in acts of Congress. Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma, 618 F.2d 665 (10th Cir. 1980); King v. Gemini Food Servs., Inc., 438 F. Supp. 964 (E.D. Va. 1976), aff'd, 562 F.2d 297 (4th Cir. 1977), cert. den'd, 434 U.S. 1065 (1978). Thus, the Government will look to state law only where no Congressional act is controlling. United States v. Big Crow,

523 F.2d 955 (8th Cir. 1976), cert. den'd, 424 U.S. 920 (1975).

Just as Congress may preempt its "continuing adoption" of state criminal law under the Assimilative Crimes Act, so Congress may also abridge its deference to state law under the FTCA. This is especially true where, as in the case sub judice, a claim arises on a federal enclave such as a military base, upon which Congress possesses exclusive legislative authority pursuant to Article I, Section 8 and Article IV, Section 3 of the Constitution.

With regard to the sale of alcohol on Army bases, Congress has specifically chosen not to delegate to the states the regulation of liquor sales, instead authorizing the Secretary of Defense to promulgate regulations governing its sale. 50 U.S.C.A. Appx. §473 (1987). Violation of these regulations

constitutes a criminal offense. Id. The only relinquishment of legislative jurisdiction over liquor sales concerns the minimum drinking age. 10 U.S.C.A. §2683(c) (1987). Even this limited relinquishment brought with it the requirement that the Secretary report to Congress on, inter alia, the effects of the minimum drinking age on the incidence of automobile accidents. 1985 U.S. Code Cong. & Ad. News 472, 729-30. Under this statutory authority, the Secretary of Defense has promulgated a myriad of regulations dealing with the sale and distribution of alcohol, including regulations specifically prohibiting the sale to those under 21 and to those already intoxicated. Army Regulations 210-65. In addition, Congress has directed the armed services to establish alcohol rehabilitation programs, further evidencing Congressional intent to control

exclusively the area of alcohol consumption among servicemen. 50 U.S.C.A. Appx. §473. In general, these regulations were promulgated not only to insure the morale of the serviceman, but to promote the general sobriety of members of the armed services, and presumably to protect the public at large from injuries caused by intoxicated servicemen of the armed services. When Congress authorized the Secretary of Defense to permit the sale of alcoholic beverages on military installations, and when Congress directed the armed services to establish alcohol rehabilitation programs, the armed services assumed a duty to perform these services with due care. The fact that the Commonwealth of Virginia recognizes neither a statutory nor common law theory of dram shop liability cannot serve as a basis to eliminate this duty, as the duty arises under federal law. Notwithstanding

the language of the FTCA, when Congress has spoken, it preempts that body of state law which defines tort liability.

Congressional intent to preempt state law with regard to sales of liquor on military bases may be inferred from the pervasiveness of the scheme of alcohol regulation. Cf. Local 926, International Union of Operating Engineers, AFL-CIO v. Jones, 460 U.S. 669 (1983) (state tort action preempted by NLRB). Congressional intent may also be inferred from the uniformity of a regulatory scheme, which applies more or less across the board to all branches of the military. Because Congress intended to preempt state law with regard to the sale and dispensation of liquor on military bases, resort to state law in defining the duty to be observed by those undertaking the sale of liquor on military bases is not only illogical, it

is unconstitutional pursuant to Article VI, Clause 2 (the Supremacy Clause) of the Constitution. The undertaking of the sale of alcoholic beverages on military bases, which Congress was free to permit or deny, and which Congress has seen fit to regulate as a matter of federal law, must necessarily be judged under a federal standard when Congressional policies are not carried out.

There is no doubt, as the District Court found, and the Court of Appeals recognized, that the Army violated its own regulations when its employees permitted the underage Patterson to consume liquor at Army installations, continued to serve him when he was extremely and visibly intoxicated, and where, further, it was foreseeable that he would later attempt to operate a vehicle.

Not only did the negligent acts

giving rise to this action occur under military authority, but in addition, they occurred within a federal enclave totally under the jurisdiction of the Congress of the United States. There is thus no more reason for Virginia law to define the requisite duty to be observed on the U.S. Army Base than there would have been had Patterson been served liquor in the District of Columbia in a civilian establishment, and then been involved in a collision in Virginia.

Petitioner's argument, one that the District Court and the Court of Appeals repeatedly failed to address, is that regardless of the existence of dram shop liability, the United States, by undertaking to dispense alcoholic beverages on military bases, assumed a duty to perform these tasks with due care. While the District Court did not

find that liability attached to respondent because it failed to exercise ordinary care in the discharge of its assumed duty, it did find, as a matter of fact, that respondent violated these regulations in regard to the dispensing of alcoholic beverages to Patrick Patterson immediately preceding the accident of December 19, 1981.

Petitioner asks this Court to grant his petition for a writ of certiorari to determine whether the Good Samaritan Doctrine applies regardless of local law pursuant to the Supremacy Clause of the Constitution, and in so doing, to determine whether federal rather than state law controls under the FTCA when an act giving rise to injury occurs in a federal enclave.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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September 3, 1987

A P P E N D I X

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN T. CORRIGAN, Guardian of Daughter Maura L. Corrigan,	)	
Plaintiff,	)	
v.	)	Civil Action No. 84-0787-A
UNITED STATES OF AMERICA	)	
Defendant.	)	

ORDER

This matter comes before the Court on a trial to the bench on March 18, 1985 and May 16, 1985. For reasons stated in the accompanying memorandum opinion, the Court finds in favor of the plaintiff and award damages against the defendant in the amount of $944,496.79. The plaintiff is ORDERED to disperse these funds as directed in the accompanying opinion.

Let the Clerk send a copy of this order to all counsel of record.

Date: May 20, 1985

Richard L. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN T. CORRIGAN, Guardian of Daughter Maura L. Corrigan,	)	
Plaintiff,	)	
v.	)	Civil Action No. 84-0787-A
UNITED STATES OF AMERICA	)	
Defendant.	)	

MEMORANDUM OPINION

1. INTRODUCTION

This action is brought by the guardian of an individual who is physically and mentally incapacitated as a result of an alcohol related automobile crash in Fairfax County, Virginia. The accident was caused by the reckless driving of a highly intoxicated off-duty serviceman, Patrick M. Patterson, who subsequently pled guilty to a manslaughter charge and was sentenced to a year in prison.

Plaintiff filed the instant action under the Federal Tort Claims Act against the United States in federal district court in Ohio, alleging that the United States was negligent in serving Patterson alcoholic beverages at various military facilities on the eve of the accident when the government knew or should have known that Patterson was underage and intoxicated. The government's actions, plaintiff claims, violated both Virginia law and applicable military regulations. The Corrigan action was transferred to this court for consolidation with 84-675-A, a wrongful death action brought against the United States arising out of the same automobile crash.[1]

On October 18, 1984, this Court denied the government's motion to dismiss plaintiff's claim, holding that, under Virginia law, tavern owners have an obligation to refrain from selling

alcohol to intoxicated or underage patrons. Corrigan v. United States, 595 F.Supp. 1047 (E.D. Va. 1984). In the course of discovery, plaintiff was granted leave to amend the complaint to allege further negligence by the government in failing to identify and treat Patterson's alcohol problem prior to the accident.

II. FINDINGS OF FACT: LIABILITY

This matter comes before the Court on a trial to the bench on March 18, 1985. Pursuant to Rule 52(a), the Court makes the following findings of fact.

1. Patrick M. Patterson enlisted in the Army on June 19, 1980. After completing basic training, Patterson was sent to the Defense Language Institute (DLI) in Monterey, California, for training in the Korean language. (Testimony of Patterson)

2. Patterson had his first

experiences with alcohol while at the DLI. At first, Patterson would consume alcohol only on weekends. However, Patterson gradually started spending more and more time at the nearby Army NCO Club, which was open until 10 p.m. on weeknights and until 2 a.m. on weekends. By the end of 1980, Patterson was a regular at the NCO Club, arriving in the late afternoon or early evening and consuming large quantities of alcohol until the Club closed. At first, Patterson would drink about one 60 ounce pitcher of beer a night. Later, though, his drinking increased to three or four pitchers a night. (Testimony of Patrick Patterson)

3. When he drank at the Club, Patterson would become more relaxed, less inhibited, and a little rowdy. On one occasion, Patterson got angry with another Club patron, left the Club, and

had a fight with that patron outside; Patterson was banned from the Club for ten days for this incident. On another occasion, Patterson left the Club in an intoxicated state, climbed a tree, and subsequently fell to the ground and injured himself. (Testimony of Patrick Patterson).

4. While Patterson's academic performance was satisfactory during his first few months at DLI, it began to decline in the spring of 1981. This decline was due in part to Patterson's drinking and "personal problems," and in part to his poor academic attitude and his waning interest in learning the Korean language. (Testimony of Patrick Patterson)

5. in March 1981, Patterson bought his first car, a 1973 Torino. On May 19, 1981, the military police observed Patterson driving his vehicle in

a reckless manner. Although the officers chased Patterson, Patterson managed to evade them. Within minutes, however, Patterson drove off of the road, hit a tree, and was knocked unconcious; his car was destroyed. Patterson was taken to the emergency room at the Fort Ord base hospital, where his blood alcohol level was measured at .24. (Testimony of Patrick Patterson, plaintiff's exhibits 14 and 49)

6. On June 16, 1981, Patterson pled guilty to a reckless driving charge for the events of May 19, 1981. (Testimony of Patrick Patterson, plaintiff's exhibit 49)

7. Concerned about the deleterious effect that alcohol and drug abuse has upon service members, especially younger service personnel who have little or no experience with alcohol, Congress directed the armed

services to establish alcohol rehabilitation programs. Pursuant to directives from Congress, the Army has commendably designed and established, through regulation AR 600-85, an Alcohol and Drug Abuse Prevention and Control Program (ADAPCP). These regulations were in effect throughout Patterson's tenure at DLI, and at the time of the fatal accident in December, 1981. (Plaintiff's exhibit 2)

8. The stated objectives of the ADAPCP program, according to both the plaintiff's and defendant's evidence, were to prevent alcohol and drug abuse in the Army, identify abusers as early as possible, and to restore such abusers as effectively functioning members of the Army. In short, these regulations were developed only to benefit the individual service member and the Army, not the general public. (Plaintiff's exhibit 2,

testimony of Dr. Wise)

9. The Army claimsed a 70-75% success rate for those service personnel who entered the ADAPCP program. However, the Army claimed that its treatment was "successful" if it returned the affected person to his or her normal duties, and that person performed satisfactory work for 90 days. The program was actually far less successful in achieving long-term abstinence among alcohol abusers; the long-term success rate was especially low among young, enlisted personnel such as Patterson. (Testimony of Lt. Col. Kruzcich)

10. Army regulations indicate that Patterson's alcohol-related crash on May 19 should have been reported to Patterson's commanding officer, and to the installation's Drug and Alcohol Center. These reports would have assured Patterson's referral to the ADAPCP for

evaluation and education. (AR 190-5, AR 600-85, plaintiff's exhibit 2)

11. However, due either to procedural flaws which existed in the reporting process or to clerical error, Army records indicate that Patterson's crash was never reported to his commanding officer as required by Army regulations. Furthermore, Patterson was never referred to the ADAPCP program as required by Army regulations. (Plaintiff's exhibits 12 and 24, testimony of Patrick Patterson and Lt. Col. Allen)

12. Despite his heavy drinking and his obvious problems associated with that drinking, Patterson refused to admit that he had a problem with alcohol. (Testimony of Patrick Patterson)

13. On May 21, 1981, DLI initiated proceedings to dismiss Patterson from the school for "inadequate

efforts," and Patterson was officially dismissed from DLI on June 2, 1981. On June 12, 1981, Patterson received orders reassigning him to Fort Jackson, South Carolina. (Plaintiff's exhibits 33 and 56)

14. After serving approximately two months at Fort Jackson, Patterson was reassigned to Fort Myer, Virginia, where he reported on August 30, 1981. While at Fort Myer, Virginia, Patterson worked from 9 a.m. to 5 p.m. at the Pentagon in the Ballistic Missile Defense Office, and he lived in the barracks at Fort Myer. (Plaintiff's exhibit 51, testimony of Patrick Patterson)

15. While at Fort Myer, Patterson became a regular at an Army Snack Bar which was located next to his barracks. Patterson would routinely go to the Snack Bar five to seven nights a week and stay until it closed at 10 p.m., drinking an

average of three to four 60 ounce pitchers of beer a night. Even though Patterson was clearly accustomed to drinking large quantities of beer, he had little or no experience with drinking hard liquor. (Testimony of Patrick Patterson and George Devaney)

16. On weekends, Patterson would frequently drink and socialize at the NCO Club at Arlington Hall, a base located to or three miles from Fort Myer. On these occasions, Patterson would usually get very drunk. (Testimony of Patrick Patterson)

17. While at Fort Myer, Patterson did all of his drinking on military establishments because drinks were significantly cheaper there, and because military clubs did not have a "cover charge." (Testimony of Patrick Patterson)

18. In late October of 1981,

Patterson purchased another car, a 1965 Ford Mustang. Patterson would occasionally use the car to drive to Arlington Hall on weekends; on other occasions Patterson would take a cab to Arlington Hall with other servicemen. (Testimony of Patrick Patterson)

19. On the afternoon of December 19, 1981, Patterson went to the Snack Bar at Fort Myer and drank several beers. After leaving the Snack Bar, Patterson ran into John Crouch, a fellow serviceman, and asked Crouch if he wanted to go to Arlington Hall and "get blitzed." Crouch declined the invitation. (Testimony of John Crouch)

20. Late that afternoon, Patterson met Jeffrey Charles, a serviceman who had recently been assigned to Fort Myer. Patterson informed Charles that he was going to the Arlington Hall NCO Club that evening, and Charles

persuaded Patterson to give him a ride there that evening. Patterson then left and went back to his room. (Testimony of Jeffrey Charles)

21. At around 8 p.m. on the evening of December 19, Patterson and Charles met and went together to the Snack Bar at Fort Myer. While at the Snack Bar, Patterson consumed about three beers. Patterson and Charles left the Snack Bar at 10 p.m., and the two left for Arlington Hall in Patterson's car. (Testimony of Jeffrey Charles)

22. Service personnel from the entire Washington, D.C. area frequent the Arlington Hall NCO Club. While some service persons simply walk to the club from their barracks, many others drive to the club. The bartenders at the Arlington Hall NCO Club have no way of knowing whether a customer is from Arlington Hall or from another base.

(Testimony of Dorothy Brown)

23. Patterson and Charles arrived at the Arlington Hall NCO Club around 10:15 p.m. They showed their military identification cards at the door and were admitted. It was the clear policy of the NCO Club to admit any person with military identification who was 18 years of age or older. The club did not check identification cards inside of the club when patrons ordered drinks. (Testimony of Jeffrey Charles, Dorothy Brown, and Matthew Smith)

24. At that time, the NCO Club did not hire waitresses to serve drinks to patrons. All drinks were dispensed from the bar area by bartenders. On the night of December 19, 1981, there were two bartenders on duty. The bar area was very crowded that night, as it was every Saturday night, and it was the customary practice for the bartenders to serve a

number of drinks to one customer, who would then take the drinks back to a table where they would be consumed by other patrons. There were many patrons standing around the bar area all evening. A number of other customers were seated at one of the many tables in the bar, or were dancing on the dance floor. (Testimony of Jeffrey Charles, Dorothy Brown and Matthew Smith)

25. Drinks at Arlington Hall were very inexpensive. For example, most mixed drinks were only $1.05 each, and beers were 75¢ each. (Testimony of Matthew Smith)

26. Upon their arrival, Patterson convinced Charles to buy him a drink, a double peppermint schnapps and Coke[2], to "pay him back" for the ride. The bartender at the Club served Patterson the drink, even though Patterson was only 19 years old at the time. (Testimony of

Jeffrey Charles)

27. After buying Patterson a drink, Charles left Patterson and began to wander around the bar in search of companionship. Patterson began drinking with a small group seated at a table adjacent to the bar. Patterson spent the next two hours either drinking and talking with this group, or drinking alone at the bar. Patterson never strayed far from the bar area. (Testimony of Jeffrey Charles and Dorothy Brown)

28. After Patterson finished his peppermint schnapps and Coke, he drank Jack Daniels bourbon and Coke continuously until about 12 midnight. The bartender at the Club served Patterson Jack Daniels even though Patterson was only 19 years old at the time. (Testimony of Dorothy Brown and Jeffrey Charles)

29. Shortly after midnight, Patterson left the club alone, hopped into his car, and began to drive recklessly down the road. At around 12:15 a.m., approximately five miles from Arlington Hall, Patterson rammed his car into the car immediately in front of him on the road. Attempting to leave the scene of that accident, Patterson quickly put his car into reverse, slammed into the car behind him which was driven by John Wolfrey, and sped off. Mr. Wolfrey gave chase. (Testimony of John Wolfrey)

30. In his efforts to avoid Wolfrey, Patterson turned off his headlights and began to drive very erraticly, running stop signs and driving at speeds in excess of 60 miles per hour. (Testimony of John Wolfrey, plaintiff's exhibit 76)

31. At approximatley 12:40 a.m., Patterson ran a stop sign at the

intersection of Greenway Blvd. and S. Washington St. and struck an automobile driven by Michael McDonnell. Mr. McDonnell was killed, and a passenger in the McDonnell's car, Maura Corrigan, was knocked unconscious. At the present time, Maura Corrigan is still in a coma-like state as a result of the collision. (Plaintiff's exhibits 66-69)

32. Patrick Patterson was also knocked unconscious by the accident, but he regained consciousness the following afternoon. Shortly after his admission into the hospital, Patterson's blood alcohol level was measured at .26%. Even today, Patterson has almost no recollection of what happened that evening. (Testimony of Patrick Patterson, plaintiff's exhibits 70 and 74)

33. No intoxicants were found in Patterson's car. Based upon testimony

regarding Patterson's normal drinking habits, his activities that evening, and the location of the various accidents in relationship to the club, there is no doubt that Patterson did all of his drinking that evening at either the Fort Myer Snack Bar or the Arlington Hall NCO Club.

34. Immediately after the accident, Officer Charles Sherin of the Fairfax County Police Department was assigned to investigate the accident. In the course of his investigation, and within several days after the accident, Sherin interviewed Dorothy Brown, a bartender at the Arlington Hall NCO Club who was on duty the night of the accident. After being shown a photograph of Patterson, Brown recalled seeing him at the Club and serving him mixed drinks on the evening of December 19th. Brown stated that Patterson was drinking

heavily, and that he became loud and boisterous as the evening wore on. By the time Patterson left, Brown said, he was extremely intoxicated. Even though Brown was aware of Patterson's obvious intoxication, she never refused to serve Patterson any drinks, nor did she or any other Club employee take steps to see that Patterson was "cut off." Finally, of course, no Club employee made any effort to see that Patterson did not drive home.[3] (Testimony of Charles Sherin, plaintiff's exhibit 73)

35. The NCO Club at Arlington Hall, at least on the evening of December 19, 1981, was far too crowded for the two bartenders to pay much attention to the state of the patrons it was serving. This is especially true with regard to patrons who were being served "vicariously," or those who were being served by their friends who would

purchase several drinks from the bartender at once. (Testimony of Jeffrey Charles and Dorothy Brown)

36. Although the NCO Club did have several assistant managers on duty that evening, those managers had a number of administrative responsibilities which occupied most of their time. Therefore, the managers would have noticed only those patrons who exhibited extreme signs of intoxication, such as fighting, becoming ill, sleeping, or arguing loudly. (Testimony of Matthew Smith)

37. The bartenders at Arlington Hall received no formal training on recognizing an intoxicated patron. (Testimony of Matthew Smith)

38. In order for Patterson to have had a blood alcohol level of .26 at the hospital on the morning of the accident, he must have consumed approximately 17 ounces of 80 proof

alcohol, or about 12 mixed drinks, while at the NCO Club between 10:15 and midnight. A person of Patterson's general build would certainly have been visibly affected in his manner, speech motor coordination, and overall appearance by such a quantity of hard liquor prior to ordering his last drink. (Testimony of Dr. Harvey Cohen, Dorothy Brown)

39. In connection with the December 19, 1981 accident, Patterson pled guilty to manslaughter and was sentenced to one year in prison. He served three months of that sentence and was then paroled. (Plaintiff's exhibit 74 and 75)

40. After the December accident, Patterson did receive alcohol counseling. However, Patterson still refused to admit that he had an alcohol problem. Patterson missed appointments with his

counselors, generally considered the group therapy sessions he attended to be a waste of time, and continued to drink. (Testimony of Patterson, Dr. Wise, and plaintiff's exhibit 59)

III. FINDINGS OF FACT: DAMAGES

This matter comes before the Court on a trial to the bench on the damages aspect of the case on May 16, 1985. Pursuant to Rule 52(a), the Court makes the following findings of fact.

41. As a result of the accident on December 20, 1981, Maura Corrigan suffered extensive brain injuries. More specifically, Maura Corrigan has a nonfunctioning cerebral cortex and a severe lesion in her high brain stem. As a result of these injuries, Maura Corrigan is in a coma-like state, known as the persistent vegetative state, in which her mind is incapable of receiving or projecting information. (Testimony of

Dr. White and Dr. Victor)

42. While Maura Corrigan is generally incapable of moving or speaking in this state, family members and medical personnel have reported that parts of her body may sporadically make certain movements in response to external stimuli. While the plaintiff's expert, Dr. White, interpreted those movements to mean that Maura Corrigan is capable of perceiving pain, the Court accepts the testimony of the defendant's expert neurologist, Dr. Victor. According to Dr. Victor, the movements described by the doctors and family members are purely primitive reflex movements; the neural mechanism necessary to perform these movements lies in the lower spinal cord, and not in the cerebral cortex. These movements are not unusual in patients who are in the persistent vegetative state. (Testimony of Dr. Victor)

43. Since the accident occurred on December 20, 1981, Maura Corrigan has had no mental or intellectual appreciation of any pain. (Testimony of Dr. Victor)

44. Maura Corrigan will never recover from the injuries suffered in the automobile crash. Based upon Maura Corrigan's present condition and the length of time other patients with similar injuries have survived, the Court finds that Maura Corrigan's life expectancy, with proper medical care, is 15 years from the date of the accident.[4] (Testimony of Dr. White and Dr. Victor)

45. As a direct result of the injuries suffered by Maura Corrigan in the December 20, 1981 automobile crash, Maura Corrigan has incurred medical expenses to date in the amount of $256,846.79. (Plaintiff's damage exhibits 1-4)

46. As a direct result of the injuries suffered by Maura Corrigan in the December 20, 1981 automobile crash, Maura Corrigan will incur medical expenses in the amount of $712,650.00 from now until she dies. (Plaintiff's damage exhibit 5, testimony of Dr. White and economist H. Alan Resenthal)

47. As a direct result of the injuries suffered by Maura Corrigan in the December 20, 1981 automobile crash, Maura Corrigan will lose wages, over the course of her lifetime, in the amount of $362,650.00. (Plaintiff's damage exhibits 7-12, testimony of Mr. Rosenthal)

48. On December 29, 1983, John Corrigan, as the Guardian of Maura Corrigan, entered into a covenant not to sue with Patrick Patterson. In consideration for that covenant, Patterson paid John Corrigan the sum of

$25,000. (Plaintiff's damage exhibit 51)

IV. CONCLUSIONS OF LAW

Pursuant to Rule 52(a), the Court makes the following conclusions of law.

1. Under the Federal Tort Claims Act, which gives this Court jurisdiction over civil tort actions against the United States, the Court is obliged to determine the government's liability in accordance with the law of the place where the act or omission occurred. 28 U.S.C. 1346(b). All of the government's acts of negligence, the resulting accident, and the plaintiff's injuries took place in Virginia, and therefore Virginia law controls the substantive elements of this litigation.

2. Under Virginia law, a tavern owner who sells alcohol to a person who is either intoxicated or under the age of 21 may be found guilty of a misdemeanor.

VA Code §4-62 (1983). Furthermore, such conduct by a tavern owner gives an injured third person a cause of action against that tavern owner[5], provided that the injured person can prove that (1) a patron was on the tavern owner's premises; (2) that patron was served alcoholic beverages while on the premises even though that patron was intoxicated or underage; (3) the tavern owner knew or should have known, based upon industry standards, common experience, or actual knowledge, that the patron was intoxicated or underaged; (4) it was reasonably foreseeable that the patron would operate a motor vehicle after leaving the tavern owner's premises; (5) the patron did leave the premises and operate a motor vehicle; and (6) the patron's drunken driving caused the third person's death or injury.[6] See Corrigan v. United States, 595 F.Supp. 1047 (E.D.

Va. 1984); see also Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926).

Sale of hard liquor to underage patron

3. Under both Virginia law and the Army's own regulations, it is illegal to serve hard liquor to a patron under the age of 21. VA CODE §4-62(1)(a) (1983), Army Regulations 210-65, para. 2. In spite of Virginia law and Army regulations, however, 19 year old Patrick Patterson was sold hard liquor at the NCO Club on the evening of December 19, 1981.

4. Laws prohibiting the sale of hard liquor to minors, such as §4-62(1)(a), are clearly grounded in the belief that teenagers are not responsible enough to handle hard liquor and its deleterious effects upon the mind and body. See Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959). Concern over the disproportionately high number of alcohol-related accidents involving young

drivers, and over the special dangers presented when persons lacking in maturity and responsibility consume alcohol, has led legislators across the nation to call for higher minimum drinking ages. See 23 U.S.C. §408 (1982). Therefore, tavern owners should be keenly aware that the sale of hard liquor to an underage patron, in an era where traveling by car to and from drinking establishments is so common and where accidents resulting from drinking are so frequent, presents an unreasonable risk of harm to others using the public roads.

5. By holding tavern owners liable for their sale of hard liquor to underaged patrons, the common law places no undue burden upon purveyors of alcohol. So long as the patron presents identification indicating that he or she is old enough to purchase the drink, and

the tavern owner reasonably believes the identification is valid, the patron may be served.

6. It was reasonably foreseeable that any patron in the NCO Club on the evening of December 19, 1981 would drive after leaving the tavern. While there are service barracks located within walking distance of the NCO Club, the Club's popularity attracted service personnel throughout the area. The bartenders were aware that many patrons drove to the bar, and, short of asking the patrons themselves, had no way of distinguishing between patrons who drove and those who did not.

7. In spite of the clear and obvious dangers posed by the sale of inexpensive hard liquor to underage patrons, the Army freely sold hard liquor to all of its customers without any regard to the age of the customer. In

the instant case, this grossly irresponsible policy allowed a young patron inexperienced with the effects of hard liquor to consume a large quantity of Jack Daniels bourbon, leave the club, and venture onto Virginia highways. Patterson's reckless driving on the morning of December 20, 1981, which culminated in the tragic accident, was a direct, predictable result of the Army's failure to abide by Virginia law and its own drinking regulations. See Vance v. United States, 355 F.Supp. 756 (D.Alaska 1973)(United States could be held liable under common law to intoxicated patron of Air Force NCO Club for injuries sustained by that patron after an agent of the United States negligently served alcohol to him); see also Deeds v. United States, 306 F.Supp. 348 (D. Montana 1969)(United States held liable under common law to third party for negligently serving

alcohol to a minor serviceman in an Air Force NCO Club where the serviceman, after leaving the club, injured the third party in a drunken driving incident).

Sale of liquor to an intoxicated patron

8. Under Virginia law and Army regulations, it is also illegal to serve alcohol to an intoxicated patron. VA CODE §4-62 (1983), Army Regulation 210-65. However, on the evening of December 19, 1981, the bartenders at the Army NCO Club served Patrick Patterson alcoholic beverages while he was intoxicated. Therefore, in addition to finding the government liable for selling alcohol to an underage patron, the Court also finds the government liable for serving an intoxicated patron.

9. Under Virginia law, a person is "intoxicated" if he has consumed enough alcohol to "so affect his manner, disposition, speech, muscular movement,

general appearance or behavior, as to be apparent to observation." VA CODE §4-2(14) (1983). This definition has been accepted and used by Virginia courts in civil cases as well as criminal cases, and therefore it is binding upon this Court in determining whether Patrick Patterson was intoxicated in the NCO Club on the night of the accident. See Hill v. Lee, 209 Va. 569, 166 S.E.2d 274 (1969).

10. In holding the government liable for serving alcohol to an intoxicated patron, the Court is aware that intoxication is something which can often be identified with absolute certainty only in hindsight. Alcohol affects different persons in different ways, depending upon the consumer's physical characteristics and psychological state, the amount of food the person consumed prior to drinking,

the individual's past experience with alcohol, the rate at which the alcohol is consumed, and the person's overall alcohol tolerance.

Nonetheless, the common law does not require a tavern owner to ascertain, with any great precision, the degree to which his customers are influenced by alcohol. Clearly, bartenders need not count the drinks that a customer consumes, administer a blood alcohol test, nor require a customer to perfrom feats of physical or mental agility before serving alcohol to that customer. The law only imposes upon the tavern owner the duty to exercise reasonable care in looking for visible signs which would indicate that a patron is intoxicated, such as poor coordination and slurred speech, before serving alcohol to that patron. In order to prevail under a common law dram shop

theory of liability in Virginia, then, the plaintiff must not only show that the patron was intoxicated, but that the licensee knew or should have known that the patron was intoxicated at the time he or she was served. This standard does not place any undue burden upon the holders of liquor licenses in Virginia, especially since such licensees are in the daily business of selling alcoholic beverages and are presumed to have some expertise in recognizing signs of intoxication.

11. After carefully examining all of the evidence in this case, the Court has no trouble in concluding that employees of the NCO Club knew or should have known that Patterson was intoxicated before Patterson was served his last drink. One experienced NCO Club bartender, Dorothy Brown, noted that Patterson was "extremely intoxicated" on

the evening of the accident. Her testimony is corroborated by expert testimony which convinces the Court that Patterson, after consuming such a large quantity of hard liquor, must have exhibited clear signs of intoxication well before being served his last drink.

12. The NCO Club's failure to notice Patterson's visible intoxication is hardly surprising. The club was dimly lit, music was blaring, and the club was packed with customers creating a noisy din. Moreover, at that time, all of the drinks at the club were being served by two bartenders; the club had no waitresses. Therefore, the bartenders were under a great deal of pressure to serve drinks quickly to a large number of customers. Invariably, the large crowds around the bar and the absence of waitresses encouraged patrons to go to the bar and buy drinks for friends, who

would wait behind at a table or on the dance floor. In short, the bartenders had little or no meaningful opportunity to observe most of the patrons who were being served drinks that evening.

However, the circumstances which made it so difficult to detect intoxicated patrons were created by the NCO Club in its effort to create a desirable atmosphere and to increase profits. By keeping the bar dimly lit, playing loud music, and keeping hired help to a minimum, the NCO Club cannot escape the responsibility, imposed by law upon all tavern owners, to determine whether the purchasers of the alcoholic beverages are intoxicated.

For decades, the Virginia courts have recognized that recklessness, tragedy and death follow predictably when alcohol and automobiles are mixed. See Crowell v. Duncan, 145 Va. 489, 134

S.E.2d 576 (1926). By serving such a large quantity of hard liquor to an intoxicated, underage patron without regard to the potential consequences, the NCO club breached a duty it owes to the community--the duty to stop pouring alochol down the throat of a patron who, because of alcohol, has lost control over his judgment, his reflexes, and his sense of responsbility to others.

Failure of Army to place Patterson in rehabilitation program

13. Finally, plaintiff also claims that the United States should be held liable because it failed to (a) send along records of Patterson's May 1981 drunk driving incident to Patterson's new duty station in Virginia and (b) place Patterson in an alcohol rehabilitation program as required by Army regulations. Under Army regulations 600-85 and 190-5, Patterson's first alcohol related

accident, the May 1981 crash in California, should have been brought to the attention of Patterson's commanding officer. Such a notification would have assured Patterson's referral to the Army's ADAPCP program for alcohol rehabilitation. There is no indication in Patterson's Army records that the first drunk driving incident was ever brought to the attention of Patterson's commanding officer, nor is there any record that Patterson was referred to the ADAPCP program.

However, under Virginia law, failure to comply with the requirements of a legislative enactment or regulation constitutes actionable negligence only when the injured person is a member of the class for whose benefit the legislation or regulation was enacted. See Butler v. Frieden, 208 Va. 352, 158 S.E.2d 121 (1967); see also Smith v.

Virginia Transit Authority, 206 Va. 951, 147 S.E.2d 110 (1966). All of the evidence in this matter clearly shows that the Army regulations, which evidently were not complied with in Patterson's case due to some clerical error, were created solely for the benefit of the Army and the service person with the alcohol problem, and not for the benefit of the general public. Therefore, plaintiff has not stated a cause of action under Virginia law.

14. Moreover, even if plaintiff could state a cause of action under Virginia law for the Army's failure to abide by its own regulations, he would still have to prove that the Army's negligence in this respect was the proximate cause of the injury. See Richardson v. Lovvorn, 199 Va. 688, 101 S.E.2d 511 (1958). The evidence does not support such a finding here. First, the

ADAPCP program which plaintiff claims that Patterson should have been placed in is not designed to promote long-term abstinence from alcohol; the central purpose of the program is to make its patients productive service members again. Moreover, the program had a low success rate among young, enlisted personnel such as Patterson. Patterson's poor attitude toward his alcohol problem would have made rehabilitation even more difficult. In short, there is no reliable evidence that Patterson would not have been drinking on the evening of December 19, 1981 even if he had been enrolled in the Army's rehabilitation program.

15. The common law places no duty upon quasi-parental institutions such as the military or colleges to establish any special procedure for monitoring and curbing the inclincations of its charges,

many of whom are away from home for the first time, to consume alcohol. Programs such as the Army's ADAPCP are socially commendable efforts to deal with the problem of alcohol abuse, and the law should not discourage such efforts by creating liability to third persons when the program fails in a particular case. See VA CODE §8.01-225 (1984)(exempting persons who render emergency care to an injured person from civil damages for any act or ommissions in course of assistance).

Damages

16. When awarding damages to a permanently incapacitated plaintiff under the Federal Tort Claims Act, the Court's primary concern must be to set a sum which will adequately cover the medical expenses until the incapacitated dies. Plaintiff is clearly entitled to recover for past and future medical expenses

under the FTCA, provided these items can be proved with reasonable certainty. See Hailes v. Gonzales, 207 Va. 612, 151 S.E.2d 388 (1966).

17. Plaintiff here also claims damages for Maura Corrigan's lost earnings from the date of the accident based upon her expected earning capacity. An award of lost earnings is generally made so that the injured party can pay for those necessities and amenities which he would have provided for himself out of his earned income had he not been injured. Such an award is usually proper under Virginia law, and therefore plaintiff would ordinarily expect to recover for these lost wages in this action. Gwaltney v. Reed, 196 Va. 505, 84 S.E.2d 501 (1954).

However, in cases such as this one, the incapacitated plaintiff's personal expenses, such as food and

housing, are included in the award for future medical expenses, which are calculated to provide full-time care in a nursing facility. Because the Federal Tort Claims Act limits the government's liability to compensation for injuries and expenses actually incurred, the Fourth Circuit has determined that in FTCA actions by incapacitated plaintiffs such as Maura Corrigan, any award for lost earnings must be reduced by the amount of the award for future medical expenses. Flannery v. United States, 718 F.2d 108 (4th Cir. 1983). The Court has determined that Maura Corrigan's future medical expenses will exceed her projected lost future wages; therefore, plaintiff here can not recover any damages for those lost wages.

18. Furthermore, plaintiff claims that Maura Corrigan is entitled to damages for her past and future pain and

suffering. Bell v. Kirby, 226 Va. 641, 311 S.E.2d 799 (1984). However, because the Court has determined that Maura Corrigan cannot feel pain in her comatose condition, the plaintiff is not entitled to any award for pain and suffering. Therefore, the Court's damage award is calculated only on the basis of past and projected future medical expenses.

19. Pursuant to the Federal Tort Claims Act, and in accordance with the above findings of fact and conclusions of law, the Court finds that the defendant is liable to the plaintiff in the amount of $969,496.79. 28 U.S.C. 1346(b).

20. From the sum of $969,496.79, the United States is entitled to an off-set in the amount of $25,000 in light of the covenant not to sue agreement between John Corrigan and Patrick Patterson. VA CODE §8.01-35.1(A)(1) (1984).

21. As provided by the Federal Tort Claims Act, the Court awards 25% of the remaining $944,496.79, or $236,124.20, to the attorneys for Mr. Corrigan as attorney's fees in this action. 28 U.S.C. § 2678.

22. Out of the remaining $708,372.59, plaintiff is required to remit the sum of $42,058.36 to the appropriate department of public welfare in the State of Ohio pursuant to the state's statutory subrogation rights. OHIO REV. CODE ANN. § 5101.58 (1984).

Footnotes

[1]Civil Action No. 84-675-A, Dimos v. United States, was settleed by the parties out of court.

[2]The Court expresses no opinion as to whether the service of a weird concotion such as a double peppermint schnapps and Coke, when consumed along

with more conventional alcoholic beverages, is likely to exacerbate the normal effects of alcohol on the mind and body.

[3]When testifying at trial, over three years after the accident, Dorothy Brown could not recall seeing Patterson on the evening of the accident or telling Officer Sherin the details of what she observed that evening. However, she does not in any way dispute Officer Sherin's testimony or affidavit. Although the government objected to Officer Sherin's testimony regarding his discussion with Mrs. Brown, the Court allowed the testimony to come into evidence since the testimony is not hearsay under Rule 801(d)(2)(D). The disputed statements were offered against the United States, and were made by an agent or servant of the United States, Mrs. Brown, concerning a matter within the scope of her

employment. Mrs. Brown's statements were made while she was still an employee of the United States. Therefore, each element of Rule 801(d)(2)(D) has been met.

In any event, even if the disputed statements were hearsay, the Court believes that they would be admissible under Rule 804(5). Mrs. Brown is clearly "unavailable" as defined in Rule 804(a)(3), and the statements are highly probative of a critical fact in the case. The Court finds that Officer Sherin was a very credible witness, and that his testimony is clearly consistent with expert testimony which indicates that Patterson was probably exhibiting clearly visible signs of intoxication while in the bar. In light of the time which has passed since the night of the events in question here, and since Mrs. Brown's statements, made so soon after the night

of the accident, are so probative in the case, this Court would have had no difficulty in admitting the statements under Rule 804(5).

[4]In its preliminary findings from the bench at the conclusion of the May 16, 1985 damages hearing, the Court announced that the plaintiff had an expected life expectancy of only ten years. However, in carefully reviewing the medical records and the testimony of the expert witnesses, the Court has concluded that the plaintiff has a life expectancy of 15 years. As a result, the Court has also modified its May 16, 1985 preliminary finding as to expected future medical expenses to reflect this longer life expectancy.

[5]The Court expresses no opinion on whether, under Virginia common law, a social host may be held liable to serving alcohol to an intoxicated or underaged

person whose subsequent drunken driving injures or kills a third person. For a further discussion of this point, see Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984). See also Cole v. City of Spring Lake Park, 314 N.W.2d 836 (Minn. 1982). We also do not address the question of whether a patron who injures himself while inebriated has a cause of action against a tavern owner who negligently sold him the alcohol. For a further discussion of this point, see Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); see also Thrasher v. Leggett, 373 So.2d 494 (La. 1979).

[6]The vast majority of courts which have been faced with dram shop issues in the last 25 years have imposed civil liability upon tavern owners under the common law for the tavern owner's negligence in serving alcohol to underaged or intoxicated patrons. See

Nazareno v. Urie, 638 P.2d 671 (Alaska 1981); Ontiveros v. Borak, 667 P.2d 200 (Arizona 1983); Vesely v. Sager, 5 Cal.3d 153, 95 Cal.Rptr. 623, 486 P.2d 151 (1971); Taylor v. Ruiz, 394 A.2d 765 (Del.Super. 1978); Marusa v. District of Columbia, 484 F.2d 828 (D.C.Cir. 1973); Prevatt v. McClennan, 201 So.2d 780 (Fla.App. 1967); Ono v. Applegate, 62 Haw. 131, 612 P.2d 533 (1980); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Collitan v. Cousar, 38 Ill.App.2d 392, 187 N.E.2d 292 (1963); Elsperman v. Plump, 446 N.E.2d 1027 (Ind. Ct. App. 1983); Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Pike v. George, 434 S.W.2d 626 (Ky.App. 1968); Michnick-Zilberman v. Gordon's Liquor Store, 453 N.E. 2d 430 (Mass. 1983); Thaut v. Finley, 50 Mich.App. 611, 213 N.W.2d 618 (1973); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Munford, Inc. v.

Peterson, 368 So.2d 213 (Miss. 1979); Deeds v. United States, 306 F.Supp. 348 (D. Mont. 1969); Ramsey v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Lopez v. Maez, 651 P.2d 1269 (N.M. 1982); Berkeley v. Park, 47 Misc.2d 381, 262 N.Y.S.2d 290 (1965); Hutchens v. Hankins, 303 S.E.2d 584 (N.C. 1983); Mason v. Roberts, 33 Ohio St.2d 29, 294 N.E.2d 884 (1973); Campbell v. Carpenter, 279 Or. 237, 566 P.2D 893 (1977); Speicher v. Reda, 434 A.2d 183 (Pa. 1981); Walz v. City of Hudson, 327 N.W.2d 120 (S. Dakota 1982); Mitchell v. Ketner, 54 Tenn.App. 656, 393 S.W.2d 755 (1969); Callan v. O'Neil, 20 Wash.App. 32, 578 P.2d 890 (1978); Sorensen v. Jarvis, 350 N.W.2d 108 (Wis. 1984); contra, Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Slicer v. Quigley, 180 Conn. 252, 429 A.2d 855 (Supp.Ct. 1980); Keaton v.

Kroger Co., 143 Ga.App. 23, 237 S.E.2d 443 (Ga.App. 1977); Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981); Alsup v. Garvin-Weinke, Inc., 479 F.2d 461 (8th Cir. 1979)(applying Missouri law); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugett, Inc., 85 Nev. 99, 450 P.2d 35 (1969).

Currently, 23 states have created dram shop liability through statutes or civil damage acts: Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Michigan, Minnesota, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, and Wyoming. In all, 38 states and the District of Columbia have some form of dram shop liability.

Let the Clerk send a copy of this

memorandum opinion to all counsel of record.

Date: May 20, 1985

Richard L. Williams
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

JOHN T. CORRIGAN,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	84-787-A
	)	
UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant's motion for amendment of judgment or for reconsideration of its May 20, 1985 order. For the reasons stated in the opinion which accompanied the May 20, 1985 order, the motion is DENIED.

Let the Clerk send a copy of this order to all counsel of record.

Date: June 18, 1985

Richard L. Williams
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1868(L)

John T. Corrigan, Guardian of
Daughter, Maura L. Corrigan,

Appellee,

versus

United States of America,

Appellant.

No. 85-1872

John T. Corrigan, Guardian of
Daughter, Maura L. Corrigan,

Appellant,

versus

United States of America,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A 84-787-A)

Argued: March 6, 1986

Decided: April 2, 1987

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

Paula M. Potoczak, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellant/cross-appellee; Richard C. Alkire (John J. McCarthy; Nurenberg, Plevin, Heller & McCarthy Co., L.P.A.; John L. McGann on brief) for Appellee/cross-appellant.

PER CURIAM:

The Federal Tort Claims Act[1] (FTCA) prescribes liability, with certain exceptions not here pertinent,[2] for cases where, had the government defendant been a private individual, the acts complained of would have resulted in liability under the law of the jurisdiction in which the acts took place. The doctrine of sovereign immunity otherwise precludes suit against the United States Government.[3] The instant case was instituted by John T. Corrigan seeking compensation from the United States under the FTCA. It is the law of Virginia which governs.

On December 19, 1981, plaintiff's daughter, Maura Corrigan, was permanently brain-damaged in an automobile accident. She will spend the rest of her life, estimated to be fifteen years, in a comatose, vegetative state. The accident

occurred when Patrick Patterson, a Private First Class in the United States Army, while proceeding on a private, non-Army trip, drove through a stop sign and collided with the car in which Maura Corrigan was a passenger. The driver of Corrigan's car was killed. Patterson was severely intoxicated at the time of the accident.[4] Shortly before the accident Patterson had struck a motor vehicle while approaching a stop light a few miles from Arlington Hall NCO (Non-Commissioned Officers) Club. While attempting to leave the scene of that accident, Patterson hit a second vehicle and then drove off. Finally, the accident involving the car in which Maura Corrigan was a passenger occurred.

Patterson's intoxication resulted from extensive drinking during the course of the evening at taverns operated by the Army for the pleasure of its members and

their guests. Early on the evening of December 19, Patterson went to the Army Snack Bar located next to his barracks at Fort Myer at Arlington, Virginia, where he drank several beers. Patterson then drove two or three miles to the NCO Club at the Arlington Hall military base, arriving there at approximately 10:15 p.m. The bartenders at Arlington Hall served him mixed drinks containing bourbon until approximately midnight, even though Patterson was only 19 years old at the time and thus below Virginia's legal drinking age of 21, as well as intoxicated.[5] Federal regulations were also violated by the sale of alcoholic beverages to Patterson when he was only 19 and was inebriated.[6] During the course of the evening, Patterson became loud and boisterous, and by the time he left he was extremely intoxicated, and at least one bartender had noticed his

intoxication.[7] However, no employee of the NCO Club refused to serve Patterson a drink or made any effort to persuade him not to drive away. Many of the service personnel frequenting the Arlington Hall NCO Club drove automobiles to arrive at and depart from it. The district court determined that it was reasonably foreseeable that any patron on the evening of December 19, 1981 who was at the NCO at Arlington Hall would drive after leaving the tavern.[8] Patterson, of course, did so. It is apparently not questioned that the plaintiff produced sufficient evidence to show negligence on the part of the Government's employees. It is not contested that, as the district judge found, Patterson did all of his drinking on December 19, 1981 at either the Fort Myer Snack Bar or the Arlington Hall NCO Club.

In connection with the December 19,

1981 accident, Patterson pled guilty to manslaughter and was sentenced to one year in prison. After serving three months of that sentence, he was paroled.[9] The district court denied the United States' motion for summary judgment, rejecting the United States' argument that Corrigan had failed to state an actionable claim under Virginia law. Corrigan v. United States, 595 F. Supp. 1047 (E.D. Va. 1984). After a two-day bench trial on the issue of liability, held in March 1985, the district court found the United States liable for negligence on a dram shop liability principle, a legal theory which had not yet been ruled on by the Virginia Supreme Court. The issue of damages was tried on May 16, 1985. The district court awarded Corrigan $944,496.75. Corrigan v. United States, 609 F. Supp. 720 (E.D. Va. 1985). The resulting cross-appeals in this case

were stayed pending the decision of the Virginia Supreme Court in Hutson v. Marshall Enterprises, Inc., No. 850858 (Va. petition filed Oct. 29, 1985). The Virginia Supreme Court has in the meantime considered one issue which is the same (whether dram shop owner liability exists under a Virginia statute or the common law of Virginia) in Williamson v. The Old Brogue, Inc., _____ _____ _____ S.E.2d _____ (1986).

I.

In Williamson the Virginia Supreme Court held that Virginia does not recognize dram shop liability. The Virginia court found no statutory source of liability and no common law liability, applying the theory that the perpetrator's imbibing of the alcohol, not the tavernkeeper's supplying of it is the proximate cause of the perpetrator's

accidents. That has led us summarily to affirm Webb v. Blackie's House of Beef, Inc., 624 F. Supp. 471 (E.D. Va. 1985), _____ F.2d _____ (4 Cir. 1987), another case presently pending before us involving a defendant restaurant selling liquor and a driver imbiber not in the defendant's employ.

We conclude that Williamson also disposes of the instant case. Because the decision in the district court rested primarily on the premise that Virginia would accept dram shop liability, which Williamson proved wrong, the decision must be reversed to the extent that it rests on that ground. Moreover, we think that Williamson and other Virginia precedents make it clear that plaintiff's other theories of liability are not meritorious.

II.

Plaintiff argues that Virginia "has long recognized a cause of action sounding in negligence based upon the breach of an assumed duty . . . [and that] [t]his theory of liability has been applied to agencies of the United States undertaking tasks which must be performed with due care." Plaintiff's Opening Brief, p. 25. He asserts that this principle should be applied here to find liability on the part of the United States for its failure to comply with its regulations regarding the sale of intoxicants to underage and inebriated customers.[10]

It is of course the view of Virginia with regard to the effect of the regulations to which we must look, and we think that the view of Virginia as to this type of regulation is spelled out in Williamson irrespective of the view

Virginia would take as to the effect of other types of regulations in other contexts. In Williamson it was argued that breach of the Virginia statute prohibiting sales of intoxicants to intoxicated purchasers gives rise to actionable negligence on the part of the seller. The argument was flatly rejected. It was said that "[w]hile improved public safety and prevention of personal injury were incidental benefits flowing from the Act, public sobriety and individual moderation were its plain goals." Slip. op. p. 8. As a consequence, the Virginia court reasoned that "because the Act was not public safety legislation, it necessarily follows that a person injured by an intoxicated customer of a seller of intoxicants is not a member of the class for whose benefit the statutory provision in question was enacted. Thus, violation

of the statute does not constitute negligence per se and does not furnish the basis for a civil action in damages." (Slip op. 8).

We do not think that the Virginia Supreme Court predictably would take a different view of the legal effect of the regulations breached in this case. Their breach therefore provides no basis for liability.

In the district court, although only inferentially before us, plaintiff argued that the special relationship, the "quasi-parental" relationship, between the army and one of its members placed a special obligation on the army to deal with Patterson's alcoholism, the breach of which could give rise to liability on the part of the army. The district court rejected the argument and, we think, correctly so. The positiveness of the Virginia Supreme Court's rejection and

the basis it offered for rejection of the dram shop theory of liability persuades us that it would not recognize the special relationship between Patterson and the army to give rise to an exception to dram shop nonliability in Virginia. In Williamson, the court said, with respect to asserted dram shop liability, "the act of selling the intoxicating beverage [is] too remote to be a proximate cause of an injury resulting from the negligent conduct of the purchaser of the drink." Slip op. p. 4. The court also added "we will apply the law as it now exists, because we believe that a decision whether to abrogate such a fundamental rule . . . is the function of the legislative, not judicial branch of the government." Slip. op. p. 5. Lest this not be a clear indication of how the Virginia Supreme Court would treat the argument, we point to Bell v.

Hudgins, _____ Va. _____, _____ S.E.2d _____ (No. 83-1966, January 16, 1987), in which the court declined to hold a parent liable for the tort of a child in injuring another, in the absence of master-servant or principal-agent relationship, even though the child's proclivity to resort to violence was well-known to the parent. Noting that at common law, the liability of a parent for the tort of a child arises only where there is a master-servant or principal-agent relationship and that the legislature had enacted no statute to broaden the rule, the court said "[w]e believe that a decision whether to adopt a doctrine of parental neglect is more properly left to the legislature because of the many societal and policy considerations which necessarily bear upon such a decision policy questions generated by the rule advocated by the

plaintiff should come from the General Assembly and not the courts." It is noteworthy that the Virginia Supreme Court is not alone in its view that the legislature, and not it, is the appropriate branch of government to make fundamental changes in the common law. Kuykendull v. Top Notch Laminates, Inc., _____ Md. App. _____, _____ A.2d _____ (February 9, 1987).

III.

To summarize, we think that Virginia law would not impose liability on a defendant in the position of the government in this case. Accordingly, the judgment of the district court is

REVERSED.

Footnotes

1 28 U.S.C. § 2674 (1965).

2 28 U.S.C. § 2680 (1965 & Supp. 1986).

3 E.g., Army and Air Force Exchange Service v. Sheehan, 456 U.S. 728 (1982); Indian Towing Co., Inc. v. United States, 350 U.S. 62 (1955). See Holmes v. Eddy, 341 F.2d 477 (4 Cir. 1965), cert. denied 382 U.S. 892 (1965).

4 Immediately after the accident, Patterson's blood level of alcohol was measured at .26, well above the legal maximum for non-inebriation of .10.

5 Va. Code § 4-62 (Supp. 1986).

6 See Army Regulations 210-65 (12/1/78), para. 2-2(b)2-11(b)(2).

The regulations specifically provided in paragraph 2-2 that "no person under 21 years of age will be . . . permitted to buy, possess or consume alcoholic beverages on an Army installation unless permitted by the laws of the State in which the installation is located."

Section 2-11(a) required that installation commanders will be sure that:

> (1) Military personnel and civilian employees attend annual alcohol and drug abuse prevention briefings

> conducted by installation Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) personnel. Emphasis will be on influencing responsible attitudes and behavior toward the use of alcohol and other drugs.

Section 2-11(b) provided:

> NAFI's (nonappropriated-fund instrumentalities) dispensing alcoholic beverages may not permit the serving of more than one alcoholic drink at a time to a customer or the serving of alcoholic beverages to intoxicated patrons.

(Emphasis supplied).

7 This district court noted that, in order to have had a blood alcohol level of .26, Patterson must have consumed approximately 12 mixed drinks, or about 17 ounces of 80 proof alcohol. A person of Patterson's physical build would certainly have been visibly affected in his manner and speech by such a quantity of liquor well prior to ordering his last drink.

8 The district court in fact stated:

> Therefore, tavern owners should be keenly aware that the sale of hard liquor to an underage patron, in an

> era where traveling by car to and from drinking establishments is so common and where accidents resulting from drinking are so frequent, presents an unreasonable risk of harm to others using the public roads.

Corrigan v. United States, 609 F. Supp. at 730.

9 He also settled for $25,000, the full amount of the insurance, a claim on behalf of Maura Corrigan arising from the accident.

10 The district court ruled that the government was liable for breach of the regulation prohibiting the sale of intoxicants to patrons under the age of 21, and prohibiting the sale of intoxicants to intoxicated patrons. It ruled, however, that the government was not liable for its failure to police Patrick Patterson in an alcohol rehabilitation program as the regulations required.

MURNAGHAN, Circuit Judge, dissenting:

The fact that Patterson was an enlisted man, an employee of a particular sort, subject to the authority of the Army, sharply differentiates the present case from the ordinary dram shop scenario. Therefore, I dissent from the majority's conclusion that Williamson v. The Old Brogue is dispositive in the present circumstances.[1] Rather, I would remand for development of the facts as to the extent of the Army's control over Patterson and consideration of the legal implications of that control.

As things have developed in the history of the law, it is customary that, for a superior (the employer) to be answerable under the doctrine of respondeat superior, there should be proof of the scope of employment engaged in by the employee and that he was

engaged in it when the event occurred. While that is customary, it is by no means exclusive. There can be circumstances, particularly of greater than ordinary control exercised by the superior (in this case the United States Army), which may serve to render it answerable for the acts of the employee (here a serviceman on active duty) even if the employee was outside the scope of employment. See 3 F. Harper, F. James & O. Gray, The Law of Torts, § 18.7 p. 1734 (2d ed. 1986); R. Dooley, Modern Tort Law § 16.02 (Supp. 1986). Murphy v. Army Distaff Foundation, Inc., 458 A.2d 61, 63-64 (D.C. App. 1983) ("[T]he employer's duty to supervise is not merely to be judged by the concept of respondeat superior. Rather it is an allegation of direct negligence and '[t]his duty extends even to activities which, . . . [sometimes] are outside the scope of

employment.'") (citation omitted); Robertson v. LeMaster, 301 S.E.2d 563, 567 (W.Va. 1983) ("We recognize that under traditional principles of master-servant law an employer is normally under no duty to control the conduct of an employee acting outside the scope of his employment . . . . The issue presented by the facts of this case, however, is not the [employer's] failure to control [the employee] while driving on the highway; rather it is whether the [employer's] conduct prior to the accident created a foreseeable risk of harm.").

It may well be that usage is so universal requiring that the employee be shown as having acted in the scope of his employment, not on a frolic of his own, that the doctrine of respondeat superior is thus limited and the liability should promenade under another, different tag.

However, linguistically respondeat superior merely means "the employer is answerable", so what I am discussing is actually another, less frequent form, of respondeat superior. However it may be denominated, the important consideration is that it exists and may be present under the facts of the instant case.

The Restatement (Second) of Torts § 317 provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master upon which the servant is privileged to enter only as his servant...and
>
> (b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

All of those requirements are arguably present in the case of Patterson. See Johnson v. United States, 704 F.2d 1431, 1436 (9th Cir. 1983).

Recently, in Webb v. Blackie's House of Beef, No. 86-1519 (4th Cir. February 20, 1987), this Court confronted the question of whether Virginia common law imposes dram shop liability on a purely private tavern keeper not the drunken driver's employer. We decided that there is no such common law liability in Virginia, relying on Williamson v. The Old Brogue, Inc., _____ Va. _____, 350 S.E.2d 621 (1986). The majority of the

panel finds Williamson controlling on the present facts as well.

The majority may ultimately be right that if asked to decide this case, the Virginia Supreme Court would not hold the Army responsible. But, with respect, the majority makes the assumption prematurely. To my mind there are still questions which have not been answered by Williamson or any other Virginia case establishing the principle applicable in the present case, which a Virginia court should first address and answer. The questions go to the issue of whether there is another ground of common law liability--not necessarily denominated a dram shop principle--which applies here, and to whether the Virginia Supreme Court's analysis of the dram shop rule would differ in the presence of the unique facts of the present case.

Although case law rejecting employer

dram shop liability[2] and holding that the drunken driver's ingestion of the liquor, not the tavern keeper's supplying of it, was exclusively responsible for the driver's wrongdoing has rested on several theories,[3] where, such as here, there was no governing statute one consideration has often played a prominent role. That is the view that an employer does not have sufficient control over the employee when he is away from the employer's premises and off duty--so free to dictate his own actions, free of employer direction--to warrant imposition on the employer of a legal duty or a finding of proximate cause. Pilgrim v. Fortune Drilling Co., Inc., 653 F.2d 982 (5th Cir. 1981) (where injury caused by employee's fatigue, employer had no legal ability to control employee off premises); Pursley for Benefit of Clark v. Ford Motor, 462 N.E.2d 247 (Ind. App.

1984) (employer did not have duty to control employee's off-premises conduct); Costa v. Able Distributors, Inc., 653 P.2d 101 (Hawaii App. 1982) (employer not liable because did not know of employee's conduct); Cowin v. Huntington Hospital, 130 Misc.2d 267, 496 N.Y.S.2d 203 (1985) (employer did not take charge of employee).[4]

The facts before the Virginia Supreme Court in Williamson presented such a case. The purveyor of drink in Williamson was a company whose only connection with the drunk driver was to sell him a drink. The case before us is fundamentally different. The United States Army both asserts, and as a legal and practical matter has, such substantial control over its members, that serious questions are raised about the Army's responsibility for the conduct of those members, even "off-duty" ones,

assuming an active duty soldier is ever entirely "off-duty", particularly when that conduct is known to the Army, tolerated by the Army and could be prevented by the Army. In my view Williamson does not require the conclusion that the Army has no legal responsibility when such conduct foreseeably results in serious injury.

The differences between the Army and an ordinary employer are obvious and substantial in many respects. Initially, under ordinary circumstances, an employer is without authority to direct the employee not to drive even if the employee is obviously intoxicated. If the employer tried to stop his employee from driving while intoxicated, the employee would be free to quit. Patterson, as a private first class in the Army, was not at liberty thus to terminate his enlistment. Although the

predicate facts were not developed at trial since the decision on dram shop liability made proof on the point irrelevant, in all likelihood the Army had the wherewithal, knowing of Patterson's propensities, to prevent him from drinking entirely. Alternatively, the Army had the means to compel Patterson to take steps which predictably would have resulted in a more responsible use of alcohol by demanding that he attend an alcohol education and control program.[5] The usual tavern keeper or employer is not in a position to exercise the same degree of control over its employees as the Army.

The Army's influence over Patterson is perceptible in other respects. Patterson was assigned to Fort Meyer barracks as living quarters. Although it is not established by the record because it was not relevant under the district

court's ultimately to be found erroneous theory that a dram shop principle of liability applied, it is probable that Patterson was required to spend the night at the barracks at Fort Meyer. It is likely, therefore, that a principal reason Patterson was behind the wheel on the night Corrigan was injured was Patterson's attempt to comply with the Army's requirement that he return to Fort Meyer.[6]

In addition, as a matter of common knowledge, an enlisted man practically cannot disregard the "request" of an officer. On remand, the district court should inquire as to whether there was present in the Arlington Hall NCO club an officer who observed Patterson in an inebriated state, and who, if he had "requested" that Patterson not drive, could have effectively compelled him not to do so.[7] Inquiry should also be made

of the Army's responsibility, assumed or otherwise, to station an officer at the Arlington Hall NCO Club to maintain order and decorum. It is pertinent to observe that in Johnson v. United States, 496 F. Supp. 597 (D. Mont. 1980), aff'd, 704 F.2d 1431 (9th Cir. 1983), an Air Force sergeant, manager of the NCO club, was responsible to insure that all state laws and all applicable Air Force directives, regulations, operating instructions, policies and procedures were followed. 496 F. Supp. at 601. That suggests at least that a manager with similar responsibilities was at all pertinent times in charge of the Arlington NCO Club.

Finally, neither the usual tavern keeper nor the usual employer knows of the drunken driving proclivities of his patron. Patterson, on the other hand, had one or more drunken driving scrapes

of which the Army was informed. The district court found that in March 1981, Patterson had been observed driving recklessly by military police, who gave chase. Attempting to evade the military police, Patterson drove off the road into a tree, destroying his car. He was taken to an army hospital unconscious, and his blood alcohol level was measured at .24, well above the level defining intoxication. As the result of that incident, per regulations Patterson should have been assigned to the army's alcohol treatment program. The program had a success rate of 70-75% among personnel in general, although the rate was somewhat lower for long term, young alcohol abusers like Patterson. However, the reckless driving incident was never reported to Patterson's commanding officer as required by army regulations and Patterson never entered treatment for

his drinking problems. Corrigan v. United States, 609 F. Supp. 720, 724 (E.D. Va. 1985).

The Army takes the position, and the majority accepts, that no cause of action in negligence arose from the Army's breach of its own regulation because, even if there had been Army negligence, the regulations were exclusively concerned with the maintenance or improvement of the capability of Army personnel to perform tasks assigned by the military and not directed to the protecting of civilian drivers. The regulation of itself accordingly supposedly did not mandate a finding of proximate cause. It is not necessary to quarrel with the point. Nonetheless, the fact that the Army had the authority to put such a regulation in place, coupled with its power to compel Patterson's treatment for alcohol abuse and probably

to take other measures to prevent Patterson from drinking to excess, distinguishes the Army from other purveyors of alcohol and changes the negligence equation. Thus there are questions of foreseeability and proximate cause which might be answered in the affirmative in view of the regulation, even though it did not of itself automatically create a cause of action.

In short, it is not at all clear that the Army should bear no legal responsibility for the acts of Patterson. Certainly the determination that dram shop liability should not be imposed on the facts of Williamson does not compel such a conclusion. In my view, the case should be remanded so that the facts relevant to the Army's relationship with Patterson can be developed, the parties can brief the legal significance of those facts, and the lower court can determine

in the first instance whether there is a genuine issue for the fact-finder to decide.[8]

A different conclusion is not dictated by the discussion in Williamson of the relative functions of the legislature and the judiciary. It is true that Williamson made much of the fact that the Virginia legislature had not seen fit to enact dram shop liability by statute; nor had liability been created by the common law courts. The court held that in looking to the disparate functions of legislature and court, if dram shop liability was to be part of Virginia law, that change should be brought about by the legislature rather than the court. It is the General Assembly not the judiciary which should "legislate." In reaching that decision, the Virginia Supreme Court relied to a large extent on Felder v. Butler, 292 Md.

174, 438 A.2d 494 (1981) (rejecting dram shop liability in Maryland out of deference to the legislature). See also Kuykendall v. Top Notch Laminates, Inc., No. 711 (Md. App. February 9, 1987) (Refusing to impose dram shop liability upon an employer, on the grounds of lack of control. "There is nothing in the matter sub judice to suggest that Top Notch had a right to control Wilkes' actions after business hours."). Contra Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984). However, where the question under state law is merely undecided, instead of, as in the case of Williamson, actually resolved contrary to one party's point of view, the fact that the circumstance is novel does not prevent the court from going forward to decide a question of negligence. See Naccash v. Burger, 223 Va. 406, 290 S.E.2d 825 (1982) (recognizing cause of action for

wrongful birth in Virginia, which, though novel, involved an application of traditional tort principles of negligence to be evaluated by the courts and not the legislature); Kelly v. R.G. Industries, Inc., 304 Md. 124, 497 A.2d 1143 (1985) (holding manufacturer liable at common law for injuries caused by "Saturday night special" handgun). The court in Kelly explained that:

> The fact that a handgun manufacturer or marketer generally would not be liable for gunshop injuries resulting from a criminal's use of the product, under previously recognized principles of strict liability, is not necessarily dispositive. . . . '[T]he common law is not static; its life and heart is its dynamism--its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems.'

304 Md. at 140, 497 A.2d at 1150.

My research and the research of the parties have not uncovered any Virginia

authority on the questions which still remain to be decided in the present case, despite the decision in Williamson v. The Old Brogue, Inc. That fact does not inevitably lead to the conclusion that the Virginia Supreme Court would render a decision against the plaintiff here because to do otherwise would represent new law and different law. It may mean only that that court has yet to confront the case where the defendant owns, for example, a company town or a lumberjack camp, part of which is a tavern owned by the defendant, where the drunken driver, who sleeps on the premises, has been observed receiving his fill of liquor and happens not to be free to quit if told not to drive under the influence of intoxicants, and is practically forced, to the owner's knowledge, to drive his own vehicle.

Nor, as the majority suggests is

Bell v. Hudgins, Va. _____, 352 S.E.2d 332 (1987), holding that parents are not liable for the torts of their minor children, enlightening as to the Virginia Supreme Court's probable disposition of the present issue. Hudgins is distinguishable for at least three reasons. First, in Hudgins the Virginia court held that parents are not liable solely because of their paternity in the absence of a master-servant relationship. A master-servant relationship--or something very analogous--is present in Patterson's case. Second, there are significant policy reasons, absent in Patterson's case, not to impose liability on parents, for example the effect such liability would have upon family relationships. Plaintiffs in Hudgins argued that Hudgins' parents should have had the minor Hudgins confined because of his propensity to violence. If the court

had endorsed plaintiffs' view, it would have created a painful and unfortunate dilemma for parents wh would be forced to choose between the well-being of a disturbed child who might fare better at home and the economic consequences applicable to the decision. Finally, in Hudgins the court felt constrained by the fact that Virginia had enacted a statute creating parental liability for certain damages caused by minors, but limited the amount of recovery to $500. The court was unwilling to expand upon--to overrule--the statutorily created limit of liability. There has been no legislative action whatsoever on the dram shop question in Virginia. All of these factors distinguish Hudgins from Corrigan's case and limit its usefulness as a window upon the Virginia Supreme Court's perceptions of the present circumstances.

If I am right as to the existence of pertinent unanswered questions, there arises the subsidiary question of who, in the first instance, should address and answer the questions. Here we have questions governed by Virginia law. They have not been answered by any Virginia authority, mainly, I suppose, because prior to the enactment of the FTCA in the late 1940's, sovereign immunity precluded suit for the most likely (but not the only possible)[9] defendant in cases proceeding under alternate or independent theories other than the dram shop principle. The district court did not decide the unresolved questions since they were rendered superfluous by the district court's conclusion, later proven mistaken, that there was a dram shop principle applicable under Virginia common law.

There are several questions still

remaining open after Williamson v. The Old Brogue, Inc. is applied to the facts of the instant case. It is well established that where state law is controlling in adjudicator who is a judge of that state (normally the district judge) is to be accorded substantial deference in determining what the correct law is. Here the panel consists of two Maryland judges and one North Carolina judge, while the district judge had been a practitioner in Virginia, and upon becoming a judge, has been assigned to a court in that Commonwealth. We should first obtain the advantages accruing from hearing his opinion on those questions serving to distinguish Williamson v. The Old Brogue, Inc., but not answered in the earlier opinion. Rabon v. Guardsmark, Inc., 571 F.2d 1277, 1279 n.1 (4th Cir. 1978), cert. denied, 439 U.S. 866 (1978) (citing Williams v. Weyerhaeuser Co., 378

F.2d 7, 8 (4th Cir. 1967) ("[W]e are entitled to accept the interpretation of the District Judge as one versed in such local matters.")).

Alternatively, Virginia, as the latest of the states in the Fourth Circuit to do so, has by statute adopted a reference procedure under which we in the Fourth Circuit can submit a question of Virginia law to the Supreme Court of Virginia for resolution, rather than attempting to resolve it ourselves when it has not heretofore been adjudicated by the Virginia court or the answer is an extremely beclouded one. Va. Ct. Rules, Rule 5:42 (enacted January 16, 1987, effective April 1, 1987).

Hence, there are either of two sources to whom the case should be remanded or referred, the federal district court for the Eastern District of Virginia or the Supreme Court of

Virginia. After we have had the benefit of the views on the Virginia law of either of those two authoritative sources, the case on appeal can be expected again to appear before us. We will then be in a more informed position to apply the Virginia law in a case which is controlled by the doctrines applicable under that state's jurisprudence.

It is a mistake in my mind merely to apply Williamson v. The Old Brogue, Inc. woodenly to the present case when there are distinctions, one or more of which might be determined to compel a different result. I by no means have felt it incumbent to make up my mind whether there is such a distinction. I only wish to emphasize that, in my humble opinion, my panel colleagues have reached out to decide unresolved questions of Virginia law, ignoring certain facts and their possible pertinence, without availing

themselves of respected Virginia authority of two sources, both of which are available to them, namely, the district court from the Eastern District of Virginia and the Supreme Court of the Commonwealth.

I, therefore, respectfully dissent.

Footnotes

[1] It is pertinent to observe that in Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969), a Federal Tort Claims Act case concerning an intoxicated serviceman, which on the facts had many similarities with the present case, it was first observed that, just like Virginia, Montana, whose law was applicable, does not have a dram shop act. In concluding that there should be liability found, despite the absence of a dram shop theory of liability, the court held:

> Applying these rules to the facts in the instant case, in my opinion the employees of the United States who sold and served the liquor to an intoxicated minor, knowing that it would be necessary for the airmen at the party to return their dates to Havre by private automobile, could reasonably foresee or anticipate some accident or injury as a reasonable and natural consequence of their illegal and negligent acts, particularly in view of the ever increasing incidence of serious automobile accidents resulting from drunken driving.

306 F. Supp. at 361.

[2] See Kuykendall v. Top Notch Laminates, No. 711 (Md. App. February 9, 1987); Whitaker v. Jet-Way, Inc., 152 Mich. App. 795, 394 N.W.2d 111 (1986); Pinkham v. Apple Computer Inc.,; 699

S.W.2d 387 (Tex. App. 1985); Pursley for Benefit of Clark v. Ford Motor, 462 N.E.2d 247 (Ind. App. 1984); Thomson v. Trickle, 114 Ill. App. 3d 930, 449 N.E.2d 910 (1983); Wienke v. Champaign County Grain Association, 113 Ill. App. 3d 1005, 447 N.E.2d 1388 (1983); Comment, Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated, 19 Wake Forest L. Rev. 1013, 1016 (1983). Contra Chastain v. Litton Systems, Inc., 694 F.2d 957 (4th Cir. 1982), cert. denied, 462 U.S. 1106 (1983); Dickinson v. Edwards, 105 Wash.2d 457, 716 P.2d 814 (1986); Otis Engineering Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983); Romeo v. Van Otterloo, 117 Mich. App. 333, 323 N.W.2d 693 (1982) (called into question by Whitaker v. Jet-way, supra); Annot. 51 A.L.R. 4th 1048 (1987).

[3] Some courts have held that state statutes defining the scope of dram shop liability bar common law extension. Meany v. Newell, 367 N.W.2d 472 (Minn. 1985). That rationale is not relevant to the present case because Virginia has not enacted a statute on the subject. Other cases have rejected employer liability as indistinguishable from social host liability. Meany v. Newell, supra; Whitaker v. Jet-Way, Inc., 152 Mich. App. 795, 394 N.W.2d 111 (1986); Burkhart v. Brockway Glass Co., 507 A.2d 844, 352 Pa. Super 204 (1986); Keckonen v. Robles, 146 Ariz. 268, 705 P.2d 945 (1985); Comment, supra, at 1016-17 (courts have refused to extend liability to social hosts because they are unlikely to carry liability insurance and have little expertise in judging degrees of intoxication). It is clear that the Army, which charged for

each drink served Patterson, was not a social host to Patterson. See generally, Annot. 51 A.L.R. 4th (1987).

[4] However, the Virginia case of Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926) held a father liable for knowingly letting his son drive while inebriated when an accident ensued. The rationale seems to rest more on the factor of control (scope of employment) than on the blood relationship. The court expressed no dissatisfaction with the trial court's instruction that the father/son relationship had no bearing. Crowell v. Duncan, 145 Va. at 496 n.1, 134 S.E. at 578 n.1 (in particular instruction No. 7 is relevant).

The Army let Patterson drive away aware that he was extremely intoxicated and that on a prior occasion, while in such a condition, he had come to grief. In Crowell v. Duncan the Virginia Supreme Court cited with approval an Alabama case stating:

> The owner of an automobile is liable for injury inflicted on a pedestrian by his adult son in the use of the machine under circumstances where the doctrine of respondeat superior would not apply, if the son was, to the knowledge of the owner, incompetent to handle the machine with safety.

Crowell v. Duncan, 145 Va. at 509, 134 S.E. at 581 (citing Gardiner v. Solomon, 200 Ala. 115, 75 So. 621 (1917) (emphasis supplied)). See also Kidd v. DeWitt, 128 Va. 438, 105 S.E. 124 (1920) (employee

off duty was not in the scope of employment but on a frolic of his own).

[5] One had been actually prescribed on a mandatory basis but the Army failed to require that Patterson attend. Corrigan v. United States, 609 F. Supp. 720, 725 (E.D. Va. 1985) (citing Army Regulation 190-5, 600-85).

[6] It is observed that the likelihood that Patterson would depart the club driving his own vehicle was very great and known. As the majority states "it was reasonably foreseeable that any patron . . . who was at the NCO at Arlington Hall would drive after leaving the tavern." The court in Johnson v. United States, 496 F. Supp. 597, 603 (D. Mont. 1980), aff'd, 704 F.2d 1431 (9th Cir. 1983), which involved an accident caused by an intoxicated serviceman, cites the earlier case of Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969):

> The increasing frequency of serious accidents caused by drivers who are intoxicated is a fact which must be well known to those who sell and dispense liquor. This lends support to those cases which have found the automobile accident to be "the reasonably foreseeable" result of the furnishing to the intoxicated driver, at least where the person furnishing the liquor knew that the intoxicated person would be driving on a public highway.

306 F. Supp. at 358. In Deeds, also a case concerning an intoxicated

serviceman, it was observed:

> The only transportation available to plaintiff for her return to Havre was by private automobile, no bus or other public transportation being available. Nor is there any evidence that any private vehicles were available except those owned and operated by Air Force personnel.

306 F. Supp. at 350. The court further observed:

> The only available transportation for plaintiff and others attending the party to return from the Base to Havre, was by private automobile operated by Air Force personnel, and this was known to the personnel dispensing liquor.

306 F. Supp. at 353.

7 For example, in Mariano v. United States, 605 F.2d 721 (4th Cir. 1979), this court held that the Feres doctrine "(Feres v. United States, 340 U. S. 135 (1950))" barred the suit of an off-duty naval officer who was injured while working at a recreational facility called the Tradewinds Club at the Norfolk Naval Station. We found that the injury--Mariano was struck in the face by a glass thrown by another serviceman--was incurred in the line of duty, an aspect not present in the case of Patterson. We reasoned that the club was the "direct responsibility of the Commanding Officer of the base, under guidelines issued by

the Chief of Naval Operations." In addition, "[t]he . . . managers were responsible for maintaining order in the Club, under instructions issued or approved by the Commanding Officer." Finally, "[a]ll military personnel, whether patrons or employees, were subject to discipline under the Uniform Code of Military Justice for their conduct in the Club." 605 F.2d at 723. If the same was true of the Arlington Hall NCO club, the Army there exercised a far greater degree of control over the activities of its patrons than does the ordinary tavern keeper or employer.

[8] In passing, it merits mention that the Army differs radically from the usual tavern keeper in that the ordinary tavern keeper's motive is mainly--in most cases exclusively--one of making a monetary profit. The Army, on the other hand, does not operate its taverns solely for the purpose of competing with private individuals to make money. The probable justification for the Army's maintenance of NCO clubs and other taverns is to improve the morale of Army personnel and prospective recruits for the Army, leading to their greater combat-readiness, to make them happier, therefore, more efficient, soldiers and civilian personnel. The purpose in supplying the liquor is, therefore, not to make a monetary profit without regard to the effect on the imbiber. It rather abjures that policy and provides its personnel with readily accessible and cheaper taverns only to make more efficient Army personnel in general by improving their morale. Such a difference in objective might warrant a different result from that reached in

Williamson v. The Old Brogue, Inc. involving a purely private tavern. The effect of the difference in approach on the liability vel non of the Army was not discussed in the lower court.

[9] The United States is liable if a private person would be even if the negligence producing activity was one only the government performs. Rayonier, Inc. v. United States, 352 U.S. 315 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 85-1868
NO. 85-1872

John T. Corrigan, etc.,

Appellee,

versus

United States of America,

Appellant.

On Petition for Rehearing with Suggestion for Rehearing In Banc.

O R D E R

The appellee/cross-appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. On the question of rehearing before the panel, Judge Murhaghan voted to rehear the case. Judges Winter and

Ervin voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judge Murnaghan voted to rehear the case in banc; and Judges Winter, Russell, Widener, Hall, Phillips, Sprouse, Ervin, Chapman, Wilkinson and Wilkins voted against in banc rehearing.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter.

For the Court,

John M. Greacen
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JOHN T. CORRIGAN, Guardian of Daughter, Maura L. Corrigan,	)	
Plaintiff,	)	
v.	)	Civil Action No. 84-0787-A
UNITED STATES OF AMERICA,	)	
Defendant.	)	

ORDER

Obedient to the mandate of the United States Court of Appeals for the Fourth Circuit dated June 24, 1987 and its opinion dated April 2, 1987, the JUDGMENT heretofore entered in this matter is VACATED. JUDGMENT is entered for the defendant and this matter is DISMISSED WITH PREJUDICE.

Let the Clerk send a copy of this order to all counsel of record.

Date: July 20, 1987 Richard L. Williams
U.S. District Judge

UNITED STATES CONSTITUTION

ARTICLE VI.--MISCELLANEOUS PROVISIONS

Clause 2. Supreme law.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. §1346. United States as defendant.

(a) . . .

(b)Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

50 USC Appx §473

Regulations governing liquor sales; penalties

The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp, station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice [10 USCS §§801 et seq.], be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment

for not more than twelve months, or both. (June 19, 1951, ch 144, Title I §6, 65 Stat. 88.)

ARMY REGULATION 210-65

CHAPTER 2

BASIC POLICIES

2-1. General. This chapter presents the basic policies on the use, control, and sale of alcoholic beverages.

2-2. Age restrictions. a. At Army installations and activities outside the United States, MACOMs will decide at what age a person can possess and use alcoholic beverages. Decisions will be based on international treaties and agreements and on the local situation.

b. In the United States no person under 21 years of age will be--

(1) Employed in any capacity to dispense, handle, or serve any alcoholic beverage unless permitted by the laws of the State in which the installation is located. In such cases, the State minimum age laws may be followed.

(2) Permitted to buy, possess, or consume alcoholic beverages on an Army installation unless permitted by the laws of the State in which the installation is located. When the State permits individuals below 21 years of age to purchase and consume alcoholic beverages, the State minimum age limits may be followed. As an exception, installation commanders may authorize military personnel to purcahse, possess, and consume malt beverages and wines on the military installation, regardless of State age limitations.

2-11. Alcoholic beverage controls. a. Installation commanders will establish policies and conduct programs to discourage the irresponsible use of alcoholic beverages. In accomplishing this, commanders should use the technical guidance provided by the installation Alcohol and Drug Control Officer and the Alcohol and Drug Dependency Intervention Council. Commanders will be sure that--

(1) Military personnel and civilian employees attend annual alcohol and drug abuse prevention briefings conducted by installation Alcohol and Drug Abuse Prevention and Control Program (ADAPCP) personnel. Emphasis will be on influencing responsible attitudes and behavior toward the use of alcohol and other drugs.

(2) All personnel who dispense and serve alcoholic beverages are briefed at least annually by representatives of ADAPCP and the installation club manager or custodians of the funds dispensing or serving the beverages. Issues discussed will include--

(a) The effects of alcohol.

(b) How to identify intoxication.

(c) What must be done if a patron becomes intoxicated, such as refusing to sell more alcoholic beverages to him and arranging transportation to his quarters.

b. Commanders must plan programs to make the use of alcoholic beverages less glamorous. The following controls apply:

(1) Giving alcoholic beverages as prizes is prohibited. Wine products, however, may be given to eligible club patrons to accompany dinner on their wedding anniversaries, birthdays, and similar occasions, if this is the policy of the installation club system.

(2) NAFIs dispensing alcoholic beverages may not permit the serving or more than one alcoholic drink at a time to a customer or the serving of alcoholic beverages to intoxicated patrons.

(3) General membership reduced-price periods (Happy Hours) will not exceed a total of 5 hours each week. Nor will the reduced-price period be longer than 2 hours on any one day. Prices will not be reduced more than 50 percent below the normal retail price. This applies only to regularly scheduled beverage operations open to the entire NAFI membership. When prices of alcoholic beverages are reduced, the prices of soft drinks will be reduced also.

c. When military personnel are cited or arrested for violation of a civil or military law relating to the use of alcohol, commanders of such personnel will comply with the provisions of paragraph 3-8, AR 600-85.

d. Army policy and blood alcohol standards related to driving after or while consuming alcoholic beverages are prescribed in AR 190-5.

No. 87-392

FILED
OCT 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN T. CORRIGAN, GUARDIAN OF DAUGHTER
MAURA L. CORRIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-392

JOHN T. CORRIGAN, GUARDIAN OF DAUGHTER
MAURA L. CORRIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioner is the guardian of his daughter, Maura L. Corrigan, who was gravely injured in an automobile accident caused by Patrick Patterson, a serviceman who had become extremely intoxicated at the NCO Club on an Army base. The accident occurred late in the evening of December 19, 1981, on a public road in Virginia, several miles from the base. Pet. App. 60-61. Patterson was 19 at the time (*id.* at 62), and had been served liquor after one of the bartenders at the Club had noticed his intoxicated state (*id.* at 62-63). Sale of liquor to a person who had not attained the local legal drinking age (21 in Virginia), and to an intoxicated person, was a violation of Army regulations (*id.* at 62, 73-74 n.6).

2. Petitioner brought this Federal Tort Claims Act (FTCA) action in the United States District Court for the Eastern District of Virginia against the United States as operator of the NCO Club. The district court held the United States liable under "a common law dram shop theory of liability" (Pet. App. 36-37), concluding that Virginia law recognizes such a doctrine (*id.* at 28-30).

While the case was on appeal (see Pet. App. 64-65), the Supreme Court of Virginia held that Virginia does not recognize the dram shop theory of liability, under which the seller of liquor to an intoxicated person is liable for injuries inflicted by that person as a result of his drunkeness (*Williamson* v. *Old Brogue, Inc.*, 232 Va. 350, 350 S.E.2d 621 (1986)). The court of appeals therefore reversed the district court on the dram shop liability issue (Pet. App. 66). Petitioner also had claimed that Virginia law recognizes " 'a cause of action sounding in negligence based upon the breach of an assumed duty' " and that the Army regulations prohibiting the sale of liquor to underage and inebriated persons constituted such an assumption of duty (*id.* at 67, quoting petitioner's court of appeals brief (at 25)). The court of appeals, again relying on *Williamson*, found that Virginia law was to the contrary (*ibid.*). Finally, the Fourth Circuit affirmed the district court's rejection of petitioner's argument that Virginia law would impose liability on the Army because of its special, "quasi-parental" relationship with Patterson (*id.* at 69-72).

Judge Murnaghan dissented from the panel's decision, arguing that the case should have been remanded "for development of the facts as to the extent of the Army's control over Patterson and consideration of the legal implications of that control" (Pet. App. 76).

3. Through the FTCA Congress has waived the United States' sovereign immunity in situations "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)). Petitioner's argument in this Court can be understood in three ways, none of which presents an issue appropriate for review.

a. First, petitioner may be understood to reiterate his argument that under Virginia law the Army would be liable because it undertook a duty to protect the public from intoxicated soldiers and performed that duty negligently. As the court of appeals explained, the Army regulations that petitioner claims were violated are much like the Virginia law, discussed in *Williamson*, prohibiting the sale of liquor to intoxicated persons (Pet. App. 67-69). In *Williamson*, the Supreme Court of Virginia found that the Virginia prohibition on the sale of liquor to intoxicated persons did not create tort liability because its primary purpose was not to protect the public (350 S.E. 2d at 624-625). Similarly, there is no indication here that the Army regulations exist to protect the public rather than for reasons of military discipline. Accordingly, the Army cannot be understood to have undertaken any duty toward petitioner and the court of appeals properly found that the Supreme Court of Virginia would take the same view of the regulations that it took of the Virginia statute (Pet. App. 69). The Fourth Circuit correctly decided this question of Virginia law, which in any event would not be appropriate for review by this Court.

b. Second, petitioner may be taken as arguing (see Pet. 23) that the Army regulations are a source of substantive tort law, independent of the law of Virginia, that the district court should have applied as "the law of the place" (see 28 U.S.C. 1346(b)).

Petitioner offers no reason to believe that Congress, in authorizing the Secretary of Defense to issue regulations governing military sale of liquor (see 50 U.S.C. App. (Supp. III) 473),[1] meant to create, or authorize the Secretary to create, tort law. On the contrary, the courts of appeals agree that "negligent performance of (or failure to perform) duties embodied in federal statutes and regulations may give rise to a claim under the FTCA, but *only* if there are analogous duties under local tort law" (*Art Metal-U.S.A., Inc.* v. *United States*, 753 F.2d 1151, 1157 (D.C. Cir. 1985) (emphasis in original)). See, *e.g.*, *Sellfors* v. *United States*, 697 F.2d 1362, 1365 (11th Cir. 1983) ("The FTCA was not intended to redress breaches of federal statutory duties."), cert. denied, 468 U.S. 1204 (1984); *United Scottish Ins. Co.* v. *United States*, 614 F.2d 188, 195 (1979) (no action under FTCA for federal employee's violation of federal statute or regulation "in absence of a demonstration that the applicable state law requirements of the good samaritan doctrine are satisfied"), aff'd after remand, 692 F.2d 1209 (9th Cir. 1982), rev'd on other grounds, 467 U.S. 797 (1984); *Schindler* v. *United States*, 661 F.2d 552, 560 (6th Cir. 1981); *Clemente* v. *United States*, 567 F.2d 1140, 1149 (1st Cir. 1977) ("even where specific behavior of federal employees is required by federal statute, liability to the beneficiaries of that statute may not be founded on the Federal Tort Claims Act if state law recognizes no comparable private liability"), cert. denied, 435 U.S. 1006 (1978); *United States* v. *Smith*, 324 F.2d

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[1]In 1985, subsequent to the events giving rise to this case, Congress adopted legislation requiring military bases, subject to certain exceptions, to adhere to the minimum drinking age of the State in which they are located (Pub. L. No. 99-145, § 1224(a), 99 Stat. 728-729, amending 10 U.S.C. (Supp. IV) 2683). The 1985 Act also amended 50 U.S.C. App. (Supp. III) 473, making the Secretary's authority over military liquor sales expressly subject to the requirements of 10 U.S.C. (Supp. IV) 2683(c) as amended (Pub. L. No. 99-145, § 1224(b)(2), 99 Stat. 729).

622, 624-625 (5th Cir. 1963); *First State Bank* v. *United States*, 599 F.2d 558, 562 (3d Cir. 1979), cert. denied, 444 U.S. 1013 (1980).[2]

Petitioner cites *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955) and *United States* v. *Muniz*, 374 U.S. 150 (1963), as cases in which the United States was held liable in tort for violations of federal statutes or regulations under circumstances where similar liability might not have been imposed under state law. *Indian Towing*, however, held that under the FTCA the United States could not assert the governmental immunity that might have been available to a municipal corporation under Louisiana law (350 U.S. at 65); it did not suggest that there might be some source of liability other than state law. Similarly, the opinion in *Muniz* made it plain that the substantive tort rules governing lawsuits by federal prisoners would be supplied by the State in which the accident occurred (see 374 U.S. at 161-162).

c. Finally, petitioner may mean to suggest that 50 U.S.C. App. (Supp. III) 473, which authorizes the Secretary of Defense to regulate military liquor sales, gives rise to liability entirely apart from the FTCA. The statute, however, makes no mention of liability. Petitioner's argument, accordingly, runs afoul of the fundamental principle that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)).

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[2] *Ingham* v. *Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), cert. denied, 389 U.S. 931 (1967), cited by petitioner as finding the United States liable "notwithstanding the FTCA" (Pet. 21), held the government liable *under* the FTCA (see 373 F.2d at 236) and referred specifically to the requirements of New York tort law (*id.* at 232, 237 n.11, 240).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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